76-5041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

NATHRA NADER AND ALBERT C. SNYDER, JR.,
Appellants.

v.

GLORIA SCHAFFER, Secretary of the State of Connecticut; DEMOCRATIC PARTY OF THE STATE OF CONNECTICUT; and REPUBLICAN PARTY OF THE STATE OF CONNECTICUT,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

LINDA F. DONALDSON,
ALAN B. MORRISON,
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Counsel for Appellants

ABE DUPLICATORS, INC.–1732 Eye Street, N.W.–Washington, D.C.–298-8837

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JURISDICTIONAL STATEMENT

This appeal raises the question of whether it is constitutionally permissible for a state to refuse to allow duly registered voters to participate in state-run, state-financed, and state-mandated primary elections merely because those voters insist upon remaining independents and refuse as a matter of conscience to join a political party. Because

the issue has never been decided by this Court, because the outcome of the case is of great concern to millions of independent voters throughout the United States and because the District Court deviated significantly from this Court's decisions dealing with the right to vote and ignored certain of this Court's decisions dealing with freedom of association, this Court should note probable jurisdiction and set the case for full briefing and argument.

OPINION BELOW

The opinion of the District Court has not yet been officially reported. It is set forth at pages A-2 and A-26 of the Appendix to this Statement.

JURISDICTION

This action challenges the constitutionality of Conn. Gen. Stat. §9-431 on the ground that its enforcement deprives plaintiffs of their right to vote and their right to freedom of association. Because plaintiffs sought an injunction against enforcement of a state statute, a three-judge court was convened pursuant to 28 U.S.C. §2281. The decision of the court on the merits was handed down on July 14, 1976, and judgment was entered on July 20, 1976, denying plaintiffs' motion for summary judgment and granting defendants' motion to dismiss. (Appendix p. A-1.)[1] A timely notice of appeal was filed in the District Court on August 13, 1976. (App. 27.) This Court has jurisdiction over the appeal under 28 U.S.C. §1253.

[1] Hereinafter, reference to documents printed in the Appendix will be made in the form "App. 1."

STATUTE INVOLVED

The statute challenged by plaintiffs, Section 431 of Title 9 of Connecticut General Statutes, provides in pertinent part:

> *Eligibility to vote at primary:* No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be . . . .

QUESTION PRESENTED

Does Conn. Gen. Stat. §9-431 deprive plaintiffs of their constitutional rights by compelling them to choose between exercise of their rights to vote and to associate in support of a candidate on the one hand, and their rights to freedom of association and to privacy of association on the other?

STATEMENT OF THE CASE

A. FACTS

Appellants, the named plaintiffs in this action, are two registered voters from the Town of Winchester, Connecticut. Each refuses, for reasons of personal conviction and principle, to enroll as a member of a political party. As a result, along with 561,936 other independent voters, who constitute 36% of the State's electorate, they are prevented by Connecticut law from voting in the state-run primary elections in which major party candidates for public office are nominated.

Appellant Nader has been a registered voter for more than fifty years and has regularly voted in federal, state and local general elections. (Nader Aff. ¶s 1, 2, App. 28.)[2] He has never been a member of any political party because such affiliation would violate his beliefs. (Id. ¶3, App. 28.) As a result, he has never been allowed to vote in the primary elections in which major party candidates for public office are nominated and has thus been unable to support fully certain candidates whom he preferred over those candidates who were eventually nominated. (Id. ¶4, App. 28.)

Appellant Snyder was enrolled as a member of the Republican Party for almost 30 years, because it was predominant in the towns in which he lived and because its candidates best expressed his views on issues during those years. (Snyder Aff. ¶3, App. 29.) In 1974, he decided that there was no significant difference between the two major parties. The Watergate scandals also persuaded him that the present political system makes candidates excessively dependent on their parties and unwilling to be independent and honest. Convinced of these facts, he was unwilling to foster the system by continuing enrollment as a party member and decided to become an independent. (Id. ¶4, App. 29-30.) Mr. Snyder believes that he has had "little real choice between candidates" at the general election and that the percentage of voters who do not vote in such elections indicates that other voters share his views. (Id. ¶5, App. 30.) Because of his decision not to enroll, he is unable to support fully certain candidates whom he prefers to those nominated in primaries. (Id. ¶6, App. 30.)

[2] This citation refers to affidavits made by each plaintiff and filed with plaintiffs' motion for summary judgment.

Plaintiffs are denied the right to participate in the primary selection process by Conn. Gen. Stat. §9-431, which provides that only voters who are on a party's enrollment list may vote in that party's primaries. In order to appear on that list, a registered voter need only inform the registrar of voters that he wants to join a particular party. §9-56. No ideological test or loyalty oath is administered. The registrar then compiles lists of the members of each party, which are made "available for public use" and are distributed to party leaders and to each candidate for nomination. §9-55. Enrollment is thus an affirmative, public act of affiliation with a political party.

A previously unaffiliated voter is immediately entitled to "the privileges of party enrollment," with the exceptions that he may not vote in a primary if he enrolls after the third Saturday before a primary, and he may not participate in a party caucus or convention if he enrolls on the day of the caucus or convention. §9-56. A voter who has been previously affiliated with one party and who wishes to be placed on the enrollment list of another may transfer simply by filing papers requesting the change with the registrar, but he may not vote in a primary or in a party caucus until six months from the date of his application. §9-59; see §9-56.

The primary in which enrolled party members are permitted to vote is not merely a private casting of preferences but is financed and regulated by the State. The State provides the machines and the polling places (§9-436; see §§9-239, 9-240) and sets the date for the election. §9-423. It prescribes the procedures to be used, the officials who must supervise, and the methods of resolving disputes and preventing fraud. §§9-431 to 9-450. Defendant Secretary of State supervises the enforcement

of these statutes and of other sections of the State's election law. §§9-3, 9-4, 9-5; Title 9, Ch. 153, *passim.*

The State also regulates in detail almost every aspect of the major parties' nominating procedures leading up to the primary elections. It requires the major parties to hold conventions at which "party-endorsed" candidates for state and district offices are selected,[3] and prescribes the procedures for delegate selection, for roll calls, and for the tallying and reporting of final results. Id. §§9-382 to 9-388, 9-407, 9-408, 9-424. Equally important, it is the State which decides whether the primary elections from which appellants are barred will take place at all, since §§9-399 to 9-415 establish the conditions which must be met before another member of the party may challenge the party-endorsed candidate in a primary election. If no candidate for a particular office fulfills these requirements, no primary is held, and the name of the party endorsee is placed on the general election ballot. If one or more candidates succeeds, a primary is held, and the winner's name is placed on the general election ballot. Id. §§9-382, 9-415, 9-416.

B. PROCEEDINGS IN THE DISTRICT COURT

On January 15, 1976, appellants filed suit in the United States District Court for the District of Connecticut on behalf of themselves and a class comprised of

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[3] "State or district offices" are those whose constituency is larger than a single town. See §§9-372(d), 9-372(m). Candidates for "municipal office" are chosen by somewhat different procedures, but primaries for those offices are held on the same day and under the same general rules as the primaries for state and district offices. See §§9-372(g), 9-390, 9-423.

"all registered voters in the State of Connecticut who are not enrolled in any political party and are therefore barred from voting in primary elections." Complaint ¶6. The Secretary of the State of Connecticut, who is Commissioner of Elections of the State *ex officio,* was named as defendant.

The complaint alleged that the enforcement of Conn. Gen. Stat. §9-431 by defendant and her agents deprived the members of the plaintiff class of fundamental constitutional rights, in violation of 42 U.S.C. §1983. Specifically, it alleged that by preventing members of the plaintiff class from voting in primary elections, while allowing party members to vote, defendant deprived the members of the plaintiff class of equal protection. As an alternative basis, the complaint alleged that defendant's conduct impermissibly compelled the members of the plaintiff class to choose between the exercise of two constitutional rights, the right to vote and the right to freedom of association.

The complaint asked the District Court to enjoin defendant from enforcing the statute insofar as it prohibits the members of the plaintiff class from voting in primary elections and to require defendant to instruct local election officials to allow each member of the plaintiff class to vote in a primary election of his or her choice. It also asked the court to certify the action as a class action and to convene a three-judge court under 28 U.S.C. §§2281 and 2284 to consider plaintiffs' claims. A motion to convene a three-judge court was filed with the complaint, and on March 23, 1976, Chief Judge Kaufman of the Second Circuit issued an order to convene a court composed of Circuit Judge Anderson, Chief District Judge Clarie and District Judge Blumenfeld.

In the interim, defendant had answered the complaint and had moved under Fed. R. Civ. P. 19 to add the two major parties in the State of Connecticut and certain local election officials as defendants. Thereafter, the Court granted the motion to the extent of requiring joinder of the major parties, and on April 13, 1976, plaintiffs filed an amended complaint adding the State Republican and Democratic Parties as defendants.[4]

Since there were no disputed issues of fact, plaintiffs moved for summary judgment, defendants filed motions to dismiss, and a hearing was held on May 11, 1976, before the three-judge panel. On June 22, 1976, United States Senator Lowell P. Weicker, Jr. of Connecticut filed an *amicus curiae* brief in support of plaintiffs' claims, and on June 30, plaintiffs filed a supplemental memorandum apprising the District Court of this Court's decision in *Elrod v. Burns*, ___ U.S. ___, 45 U.S.L.W. 5091 (June 28, 1976).

C. THE DECISION OF THE THREE-JUDGE COURT

On July 14, 1976, the District Court filed its Memorandum of Decision, denying plaintiffs the relief they sought and granting defendants' motion to dismiss the complaint, concluding that "§9-431 is reasonably related

[4] On March 12, 1976, plaintiffs filed a motion to certify the class, which was opposed by defendants. At the argument on the merits, defendant Secretary of State agreed that if plaintiffs were successful in their claims, she would extend the relief ordered for plaintiffs to all members of the plaintiff class. Consequently, plaintiffs agreed to withdraw their motion for certification of the class. See Memorandum of Decision ("Mem. Dec.") at App. 24-25 n. 2.

to the accomplishment of legitimate state goals." (Mem. Dec. at App. 21.) In reaching that result, the Court very briefly considered some, but not all, of plaintiffs' principal arguments, but devoted most of its discussion to the interests of the two major parties and the reasons why the State might have an interest in protecting the parties.

Thus, plaintiffs had argued that enforcement of the Connecticut statute violated this Court's holding in *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), by requiring independent voters to sacrifice enjoyment of certain fundamental constitutional rights — their rights to vote and to associate freely in support of candidates of their choice — in order to enjoy others — their rights to freedom of political association and to privacy of association. To establish the first part of that argument, they relied on the line of cases beginning with *Cipriano v. Houma*, 395 U.S. 701, 706 (1969), and *Kramer v. Union Free School District*, 395 U.S. 621, 632-33 (1969), which hold that total exclusion of a class of voters who are substantially interested in or affected by the results of an election can be justified only by a "compelling" state interest.[5] Plaintiffs had also argued that their right to associate fully in support of particular candidates, recognized most recently in this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), was infringed when plaintiffs were denied the right to cast a ballot for those candidates. See *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

[5] The District Court accepted plaintiffs' arguments that plaintiffs were interested in and affected by the results of the primary elections, and that in general constitutional principles relating to the right to vote apply in the primary election context. (Mem. Dec. at App. 19, 25 n. 4.)

In order to enjoy these rights, plaintiffs had argued, they are forced by the Connecticut statute to surrender other constitutional rights of overriding importance to them. Most notably, the statute coerces them into an unwanted affiliation with a political party, in violation of their right to freedom of association. *Elrod v. Burns, supra; see West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943). Moreover, because lists of enrolled voters are made public, their right to privacy of association would be infringed if they succumbed to the requirements of the statute in order to obtain their right to vote.

Despite the fact that these arguments were set forth in considerable detail in the plaintiffs' memoranda and in the *amicus* brief filed by Senator Weicker, the District Court afforded them only the briefest consideration in its 27-page opinion. With regard to the right to vote, the Court held that plaintiffs' exclusion was proper because plaintiffs did not share an interest which the Court presumed — without the slightest evidentiary support — that party members had in selecting a candidate who could win "while remaining most faithful to party policies and philosophies." (Mem. Dec. at App. 19.) As to plaintiffs' right to associate in support of particular candidates, the Court observed that plaintiffs remained free to contribute time and money to major party candidates of their choice and to choose to support other candidates selected through "alternate avenues of political activity." (Mem. Dec. at App. 6.)

In response to plaintiffs' arguments concerning their right not to be coerced into unwanted affiliation, the Court ignored *Elrod* and concluded that since party

enrollment "imposes absolutely no affirmative party obligations on the voter in terms of time or money," no constitutional right was infringed by the statute. (See Mem. Dec. at App. 8-9.) It held further that privacy of association was protectable only when an individual suffers harassment because of his associations and that plaintiffs had failed to demonstrate such harassment. (Mem. Dec. at App. 9-10.) Finally, the Court never considered the substance of plaintiffs' argument, based on *Dunn,* that the statute imposed an impermissible choice on independent voters. Instead, the Court distinguished *Dunn* on the ground that enrolling with a party is not "beyond the capabilities or powers of an elector to perform." (Mem. Dec. at App. 16.)

The bulk of the District Court's opinion was concerned with the powers and rights of the major political parties. The Court asserted, without factual support, that the present dominant position enjoyed by these two parties is in no way attributable to favors tendered by the State, but is caused by the parties' "success," over time, "in attracting the bulk of the electorate." This " '[s]uccess' . . . does not necessarily call for strict constitutional scrutiny by the judiciary." (Mem. Dec. at App. 7.)

The Court stated further that each party is a "voluntary association," whose goal is to effect "the will of its members" by achieving office and implementing "its policies and philosophies." It therefore "seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its members) policies and philosophies." (Mem. Dec. at App. 10-11.) Relying primarily on *Cousins v. Wigoda,* 419 U.S. 477, 487 (1975), the Court asserted that party members enjoy a constitutional right

of association which "may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process." (Id. at App. 11.) It stated that the State has an obligation to provide "affirmative protection" to these associational rights and, under *Ray v. Blair*, 343 U.S. 214, 221-22 (1952), to shield the political parties from "intrusion by those with adverse political principles." (Mem. Dec. at App. 11-12.) In so ruling, the Court rejected the distinction offered by plaintiffs between an interest in ensuring the loyalty of candidates for public office and an interest in ensuring the loyalty of rank and file party members. (Id. at 13-14.)

The District Court also held that the State's interest in "protecting the overall integrity of the historical electoral process" is advanced by Conn. Gen. Stat. §9-431, in two ways. First, the statute enables the State to preserve the parties "as viable and identifiable interest groups," so that the electorate may use party labels to identify the ideological position of candidates in the general election. Second, it enables the State to prevent "fradulent and deceptive conduct." (Mem. Dec. at App. 12.) In the Court's view, such conduct includes not only "raiding," which involves an attempt by the partisans of one party intentionally to distort the results of another party's primary, but also the very act of voting in a primary if one is not a member of that party. (Id. at App. 15.)

With regard to raiding, plaintiffs had argued that independent voters were by definition unlikely raiders and that the fact that the state allowed independents to enroll with a party within three weeks of a primary and one day of a caucus, while requiring party members to wait six months, indicated that the purpose of the statute was

not to deter raiding. The Court rejected this argument on the ground that the legislature had determined that the three week period "is sufficient to demonstrate that a previously independent voter will not, in voting, engage in disruptive or deceptive conduct . . . ." (Id. at App. 16.)

Finally, despite plaintiffs' extensive arguments, based on the decisions of this Court, that their fundamental constitutional rights were totally denied by enforcement of the Connecticut statute, the Court refused to apply strict scrutiny. Instead, noting that "incidental" or "minimal" burdens on the exercise of constitutional rights need not be justified by "compelling" state interests, the Court held that the statute satisfied the less rigorous "rational relationship" test. (Id. at App. 20-21.)

THE QUESTION PRESENTED IS SUBSTANTIAL AND REQUIRES PLENARY CONSIDERATION BY THIS COURT

In this case, two independent voters assert that section 9-431, which permits only members of political parties to vote in primary elections, deprives them of the power to exercise fully certain fundamental rights protected by the Constitution. The question presented is substantial, not only because a controversy involving the exercise of basic individual rights lies unresolved by this Court, but also because independent voters now play an increasingly important role in American politics. The District Court's failure to confront the arguments made by plaintiffs, and to analyze carefully and realistically the nature of the parties and their relationship with the State, leaves the full dimensions of this question unexplored.

Therefore, the Court should set this case down for full briefing and argument on the merits.

I. THE RIGHT OF INDEPENDENT VOTERS TO PARTICIPATE IN STATE-RUN PRIMARY ELECTIONS HAS NEVER BEEN CONSIDERED BY THIS COURT AND IS OF WIDE SIGNIFICANCE.

The issue raised by this case has never been presented to this Court, let alone resolved by it after plenary consideration. Although this Court has often answered related questions, its opinions do not preclude this suit. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court considered only the effect of durational enrollment requirements on the constitutional rights of registered voters who wished to enroll with political parties. Neither case concerned the rights of independent voters, who steadfastly refuse to associate with a political party. In cases like *Storer v. Brown*, 415 U.S. 724 (1974), *American Party of Texas v. White*, 415 U.S. 767 (1974), and *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court has considered the rights of independent candidates and their supporters. But the independent voters who are suing here have no connection with or interest in independent candidates and therefore the holdings of those cases are inapposite to this case.

Two factors militate in favor of this Court's giving plenary consideration to plaintiffs' claims. The first is that independent voters now play an increasingly important part in electoral politics. For various reasons, most notably because of the political events of the past ten years, their ranks have steadily grown until now 36% of the electorate in Connecticut and 38% across the country

term themselves independents.[6] Nationwide, more than 45% of the voters under 30 years of age are independents.[7] Two characteristics mark this segment of the electorate. First, the attributes of contemporary independent voters indicate that they are more sophisticated politically than the independent voters of earlier years. "They reject the party system consciously as a response to political events, while remaining interested and continuing to vote. . . . [T]he new independence has emerged among the young, well educated, professional voters largely as a response to issues."[8] Second, because of this sophistication, and because voters' political attitudes toward the parties are adopted early in life and become more fixed over time, these voters are unlikely to surrender their independence for partisanship.[9] Thus, the voters most directly affected by the results of this suit represent a large, distinct group likely to have a continuing influence on the shape of American politics.

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[6] The figure for Connecticut is derived from statistics compiled by the Secretary of State. The nationwide figure reflects voter affiliation as of 1974 and is taken from data compiled by the Survey Research Center for Political Studies at the University of Michigan. These studies are analyzed in N. Nie, S. Verba & J. Petrocik, *The Changing American Voter* 49 (Harv. Univ. Press 1976) (hereafter "Nie"), a comprehensive new study of voting behavior. A similar figure is reported in K. Mulcahy & R. Katz, *America Votes* 46 (Prentice-Hall 1976) (hereafter "Mulcahy"), whose data were compiled by the Inter-University Consortium for Political Research.

[7] See Nie at 63; Mulcahy at 46.

[8] Mulcahy at 48; see Nie at 94-95.

[9] See Mulcahy at 48; Nie at 94-95.

The second factor compelling consideration is that the right denied these plaintiffs is perhaps the most basic one enjoyed by citizens of a democracy. As a matter of simple fairness, individuals should not be excluded from participation in an integral stage of the process by which their representatives and executives are chosen and should not be forced to accept the choices made by their neighbors on so important a matter absent the most compelling of justifications. At a time when increasing numbers of the electorate are dissatisfied with existing institutions, including the major political parties, and when fewer and fewer people vote at all, those who seek to participate should not be denied that right without careful examination of their claims and of the basis for the justifications for exclusion advanced by the State.[10]

II. THE CLAIMS MADE BY PLAINTIFFS INVOLVE FUNDAMENTAL RIGHTS TO WHICH THE DISTRICT COURT GAVE INADEQUATE CONSIDERATION AND THIS COURT SHOULD RESOLVE THOSE CLAIMS ONLY AFTER FULL BRIEFING AND ARGUMENT.

Plaintiffs' principal argument is that section 9-431 forces them to choose between exercise of their fundamental rights to vote and to associate in support of particular candidates on the one hand, and exercise of their fundamental rights to be free of coerced affiliation and to

10 Dissatisfaction with existing institutions, including the parties, is described in Nie at 277-80 and in Mulcahy at 5-7; the same point was emphasized in the brief filed by Senator Weicker below. Brief of Amicus Curiae at 2, 9-10. For documentation of the decrease in participation in elections, *see* Nie at 272-76; W. Schneider & D. Yergin, "What If They gave an Election and Nobody Came?" *New Times* 25, 33 (October 1, 1976).

maintain their privacy of association on the other. Imposition of this choice violates the principle set out in *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), where this Court held that the State may not require its citizens to forego exercise of one fundamental constitutional right in order to enjoy another, unless it has a "compelling" reason to justify its action.

The District Court never dealt with this argument. Although plaintiffs are totally excluded from the franchise in a state-run election, the Court refused to recognize any infringement of plaintiffs' right to vote. Moreover, despite this Court's recent decision in *Elrod v. Burns*, ___ U.S. ___, 45 U.S.L.W. 5091 (June 28, 1976), the Court also found that plaintiffs had no right not to be coerced into unwanted affiliation. Although deprivation of either of these rights requires strict scrutiny under precedents set by this Court,[11] the court below erroneously applied a test which is appropriate only when the exercise of constitutional rights remains unimpaired or, at most, is only slightly burdened, and found that it was met for reasons which do not withstand analysis.

A. The prior decisions of this Court clearly indicate that the total exclusion of these plaintiffs from participation in primary elections infringes their right to vote. In a long line of cases, this Court has held that under the equal protection clause of the Fourteenth Amendment, every citizen enjoys a fundamental right to vote, equal to that of other citizens. E.g., *Reynolds v. Sims*, 377 U.S. 533 (1964). A number of decisions have recognized that the reach of the equal protection clause extends to

11 See note 13, *infra*.

the right to vote in a primary. *Rosario v. Rockefeller, supra; Bullock v. Carter,* 405 U.S. 134 (1972); *Gray v. Sanders,* 372 U.S. 368 (1963). One of the basic principles articulated by this Court in protecting the right to vote is that once the State has provided for popular election, it may not exclude from the franchise voters "who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote." *Cipriano v. Houma,* 395 U.S. 701, 706 (1969); *accord, Hill v. Stone,* 421 U.S. 289, 295-98 (1975); *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 207-13 (1970); *Kramer v. Union Free School District,* 395 U.S. 621, 632-33 (1969).[12] All voters are affected in much the same way by the results of the major parties' primary elections since the choice presented to everyone in the general election is significantly narrowed. In addition, because of the dominance enjoyed by the two major parties, one of the two individuals selected is likely to be the voter's next elected official.

Prior decisions of this Court make it equally clear that plaintiffs also enjoy a right to associate in support of a particular candidate and that full enjoyment of this right is denied them by section 9-431. In *Buckley v. Valeo,* 424 U.S. 1 (1976), this Court upheld the Federal

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12 These and the other cases cited above demonstrate the impropriety of the suggestion made by the District Court at the end of its opinion that plaintiffs' attempt to vindicate their rights in a judicial forum was inappropriate and that they and other independent voters should restrict themselves to electing "one or more representatives in the legislature" to alter the election laws. (Mem. Dec. at App. 24.) A significant number of this Court's decisions bear witness to the fact that an individual may seek judicial review of a state statute that infringes his voting rights or other political rights, and that the Court was in error in suggesting the contrary.

Election Campaign Act's limitation on contributions to candidates, despite the fact that the limitation burdened "one important means of associating with a candidate." *Id.* at 22. By contrast to the ability to contribute money freely, which this Court viewed as a "narrow aspect of political association," *id.* at 28, the ability to vote for a candidate must be considered a central aspect of associational rights in light of *Kusper v. Pontikes, supra,* where a statute requiring a voter to skip one year's primaries as a price to pay to switch her affiliation to another party was held to have violated her right to freedom of association. 414 U.S. at 58. By denying plaintiffs here the right to vote for particular candidates in primary elections, the State severely curtails their right to associate fully in support of those candidates.

The District Court's response to this argument consisted of two related observations, neither of which justifies the infringement of plaintiffs' rights. First, the Court noted that independents remain free to contribute time and money to candidates of their choice, but it failed to acknowledge that the same "freedom" existed in *Kusper* and was found insufficient to sustain the statute. 414 U.S. at 58. The District Court also observed that plaintiffs may support candidates selected by minor parties or through petitions. Aside from the fact that independents may have absolutely no interest in associating in support of such candidates, it should be noted that under Connecticut law, *all* voters, including party members who vote in primaries, may participate in these alternate ways of selecting candidates. Conn. Gen. Stat. §9-451d. To require independent voters to support such efforts or none at all, while allowing party members wider choice of political activity, is to deny independents equal protection.

The District Court's opinion was equally inadequate in its treatment of plaintiffs' right not to be coerced into unwanted association. This right has most recently been recognized in *Elrod v. Burns, supra,* where this Court held that state officials may not condition retention of public employment on affiliation with a political party. In considering this issue, the District Court failed to mention *Elrod* and concluded without detailed analysis that the coercion of affiliation here was "simply not comparable" to other types of improper coercion of belief. The sole reason given by the Court for its holding was that the political parties impose no affirmative obligations in terms of time or money on enrolled party members. (Mem. Dec. at App. 8-9.)

Mr. Justice Brennan's plurality opinion in *Elrod* makes clear the principle that coercion of allegiance itself, quite apart from any practical obligations imposed by the party, violates an individual's rights. "Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs." Id. at 5094. *See West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943). Affidavits filed by plaintiffs in this case establish that each plaintiff's refusal to join a political party is based on firm personal conviction and political belief. (App. 28-30.) The District Court's holding indicates its lack of appreciation for the importance of these convictions and beliefs.

A similar lack of understanding is reflected in the Court's holding that plaintiffs could not claim violation of their right to privacy of association because they had not demonstrated "actual threats or incidents of harassment." It is apparent that the reason plaintiffs do not now suffer harassment as a result of affiliation with a party

is that they do not belong to a party. Faced with the impermissible choice between their right of privacy and other constitutional rights, plaintiffs chose to preserve their privacy by not affiliating. In addition, whether or not plaintiffs or other voters might suffer harassment by virtue of party membership, opinions of this Court recognize that privacy of association and other forms of privacy of belief have an inherent value that warrants constitutional protection. *See Buckley v. Valeo, supra,* 424 U.S. at 64-66; *id.* at 237-38 (Burger, C.J., dissenting); *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965); *Talley v. California,* 362 U.S. 60, 64 (1960). If plaintiffs did succumb to the statute and swear an allegiance they do not feel, there can be little doubt that publication of a list identifying them with a particular party would invade their privacy.

By requiring plaintiffs either to affiliate with a party or to forego voting in primary elections, section 9-431 forces them to choose between exercise of their fundamental rights to be free of coerced association and to maintain their privacy of association on the one hand, and their fundamental rights to vote and to associate in support of candidates on the other. This choice is impermissible under the holding of *Dunn v. Blumstein, supra,* where this Court invalidated one-year residency requirement for voting because it forced an individual to choose between exercise of two fundamental rights. The District Court sought to distinguish *Dunn* on the ground that enrolling with a party is not "beyond the capabilities or powers of an elector to perform," thereby implying that plaintiffs here have a power to retain their full rights not shared by the plaintiff in *Dunn.* (Mem. Dec. at App. 16.) This view misconstrues *Dunn.* Professor

Blumstein was capable of retaining either, but not both, of his rights. He was free to exercise an uninterrupted right to vote by not moving; if he moved to Tennessee, enjoying his right to travel, the Tennessee statute required him to surrender temporarily his right to vote. This Court held that the state could not impose this choice without a "compelling" reason. 405 U.S. at 342. This case is precisely analogous to *Dunn*. Plaintiffs can exercise their right to vote if they are willing to be coerced into joining a political party. Indeed, many voters who would prefer to be independents may have already made this choice. Plaintiffs, on the other hand, along with many other voters, have chosen to maintain their independence and as a result have been denied their voting rights. It is precisely this kind of "choice" which was struck down in *Dunn* and which the District Court erroneously permitted here.

B. Despite the fact that the impermissible choice imposed on appellants by section 9-431 undeniably deprives them of the power to exercise two fundamental rights, the District Court refused to subject the statute to the exacting scrutiny required under the holdings of this Court.[13] Instead, finding the infringement of appellants' rights "minimal" at most, the District Court held the statute adequate

[13] The test used in *Dunn*, which appellants contend is appropriate here, requires the State to demonstrate that its statute furthers a "compelling" state interest by the least drastic available means. 405 U.S. at 342-43. This or a similar test would be required even if the statute did not force appellants to choose between fundamental rights, but merely conditioned exercise of either right on the surrender of another interest of non-constitutional dimension. *Elrod v. Burns, supra*, 45 U.S.L.W. at 5096 (freedom of association); *Hill v. Stone, supra*, 421 U.S. at 297-98 (right to vote); *see Buckley v. Valeo, supra*, 424 U.S. at 25 (right to associate with candidates); *id.* at 64-65 (privacy of association).

as promoting "legitimate state goals." (Mem. Dec. at App. 21.) In describing the goals which it held to be "legitimate," the District Court gave undue weight to the arguments advanced by appellees because it failed to recognize a number of crucial distinctions argued by appellants. Initially, it failed to confront appellants' argument that when an organization that is "private" and "voluntary" for some purposes becomes involved in state action, it loses its First Amendment associational rights to the extent that it acts under color of state law.

The District Court held that party members have associational rights which protect them from interference by other individuals and that the State has the power — indeed a virtual duty — to provide "affirmative protection of their associational rights." (Mem. Dec. at App. 6-7, 10-12.) Appellants acknowledge that the associational rights of party members may protect them from some forms of *governmental* interference. *Cousins v. Wigoda*, 419 U.S. 477 (1975). However, when a State intervenes to protect and to benefit private associations, members of those associations surrender their associational rights to the extent that they enjoy the protections and the benefits conferred by the State. If the combined actions of State and association deprive others of their constitutional rights, the association is subject to the constraints of the Fourteenth Amendment. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *see Norwood v. Harrison*, 413 U.S. 455, 470 (1973); Note, "State Action: Theories for Applying Constitutional Restrictions to Private Activity," 74 *Colum. L. Rev.* 656, 659 (1974).

The District Court also failed to distinguish between the associational interests of the political parties and

the governmental interests needed to sustain the statute. When a state intervenes to protect and benefit private associations, it must have a public purpose for doing so. As Mr. Justice Brennan stated in *Elrod v. Burns,* "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice [to justify state action]." 45 U.S.L.W. at 5096. This Court has never held that a State's assertion of a vested interest in preserving the existence, influence or composition of the two present political parties is sufficient to overcome fundamental rights of non-members. The Court's decisions upholding statutes which favor the two major parties, or impose burdens on minor parties or independent candidates, have rested on a legitimate governmental interest in maintaining the stability of the selection process, not on the hope of preserving the predominance of the Democrats and Republicans. Thus, the State may attempt to see that general election winners have the support of a majority or near majority of citizens, that factionalism is not rampant, and that campaign financing flows more readily to those whose messages are more likely to be attended. *See Buckley v. Valeo, supra,* 424 U.S. at 96; *Storer v. Brown, supra,* 415 U.S. at 733-36; *American Party of Texas v. White, supra,* 415 U.S. at 781-84; *Bullock v. Carter, supra,* 405 U.S. at 145; *Jenness v. Fortson, supra,* 403 U.S. at 442. But it may not deny minor parties or independent candidates a realistic opportunity to gain access to the ballot or discriminate against legitimate candidates. *Storer v. Brown, supra,* 415 U.S. at 739-40; *Bullock v. Carter, supra,* 405 U.S. at 145-47; *Williams v. Rhodes,* 393 U.S. 23, 31-32 (1968). Nor may it entrench "one or a few parties to the exclusion of others." *Elrod v. Burns, supra,* 45 U.S.L.W. at 5098; *accord, Williams v. Rhodes, supra,* 393 U.S. at 32.

It is not altogether clear what governmental purpose is served by excluding independents from primary elections. The District Court suggested that the Connecticut statute shielded the parties from "intrusion by those with adverse principles." Such a concept presumes that it is possible to determine what a party's principles are. But the goals and philosophies of the major political parties are kept purposefully vague and indeterminate, in order to attract the widest possible support. Furthermore, the parties make no attempt to screen potential members to ensure that they adhere to the few vague principles that may be identified in party platforms or other documents. Indeed, any registered voter in Connecticut may affiliate with either major party without a test of his loyalty or principles.[14] It is impossible to distinguish between such a voter and an independent voter in terms of his loyalty to the goals and principles pursued by a party. Moreover, the parties stated below that they would welcome plaintiffs to their ranks if they would only undergo "the mechanical process of affiliation." (Def. Parties Mem.

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[14] The vagueness of party principles and the heterogeneity of party members also make improbable the District Court's conclusion, derived without apparent factual support, that the "party labels" affixed to candidates by primary elections serve as useful guides to a candidate's positions on issues. Studies of voter behavior suggest that to the extent the party label has ever been used by voters in deciding whom to support, the important factor has been simply that the candidate belongs to the same party as the voter. See Nie, *supra* note 6, at 48. So long as party membership may be required of candidates — a requirement not challenged by plaintiffs in any way — the ability use labels in this manner will remain. *Cf. Ray v. Blair,* 343 U.S. 214 (1952) (loyalty oath for candidate). In addition, studies indicate that fewer voters now rely on party identification as a factor in casting their ballots. See Nie at 55-57.

at 19.) Unfortunately, the process is not "mechanical" for these plaintiffs. Reliance on the fact of party enrollment begs the question of whether or not independents have principles "adverse" to those of party members. If, as this Court has observed, "most voters" enroll with a party in order "to gain a voice in [the] selection process," *Kusper v. Pointikes, supra,* 410 U.S. at 58, then party enrollment by itself indicates very little about devotion to the party or constancy in support of its candidates.

With regard to the State's interest in preventing deceptive or fraudulent conduct, it is simply not realistic to fear that independent voters will engage in fraudulent conduct such as "raiding," as the State indeed acknowledges in its statutory scheme. This Court has defined raiding as "the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results." *Kusper v. Pontikes, supra,* 414 U.S. at 59; *see Rosario v. Rockefeller, supra,* 410 U.S. at 760. The considerations involved in *Kusper* and *Rosario,* where there was a real possibility that partisans of one major party might attempt to change affiliation to the other, are very different from those involved in this case. Independent voters are least likely of all groups to engage in raiding. By definition, they are not party partisans; thus, they are unlikely to throw away an opportunity to cast an affirmative ballot in order to help one party defeat another.

The State of Connecticut has recognized this fact in its statutory scheme, since it allows independent voters to enroll with a party and to vote in a primary at any time except within 17 days of the primary. By contrast, voters enrolled in one party must wait six months before

they are allowed to vote in another party's primary. Conn. Gen. Stat. §§9-56, 9-59. The District Court held that this 17-day period was designed to deter raiding by independents and was "sufficient to demonstrate that a previously independent voter will not, in voting, engage in disruptive or deceptive conduct." (Mem. Dec. at App. 16.) But a waiting period does not "demonstrate" anything about those made to wait. Its purpose is to make partisans decide the primary in which they want to vote at a time before they can determine whether or not it would be advantageous to raid the other party's primary. See *Rosario v. Rockefeller, supra,* 410 U.S. at 760-61. Whereas candidates and issues are apt to be obscure six months before an election, making the planning of a raid more difficult, they are usually clearly defined three weeks before voting occurs. If independents wished to "raid" the parties, it would be easy for them to do so under existing law, for they would only have to swear an allegiance they do not feel — not a formidable hurdle for persons who intend to vote falsely, but an impossible task for persons who are unwilling to simulate political affiliation. It is fair to conclude, therefore, that section 9-431 is not designed to deter raiding by independent voters. Although a State may lawfully impose limited durational requirements to prevent raiding, it may not for the same purpose impose a total bar against participation by independent voters in state-run, state-financed primaries. The District Court's failure to appreciate this distinction is another reason for this Court to note probable jurisdiction.

CONCLUSION

Conn. Gen. Stat. §9-431 denies appellants their fundamental rights by forcing them into a constitutionally impermissible choice. The scope of the voting and associational rights at issue in this case have not been previously considered by this Court in the context presented here. Nonetheless, prior decisions of this Court indicate that the District Court has impermissibly narrowed and undervalued appellants' rights. Accordingly, this Court should set this case for full briefing and argument to review the question presented.

Respectfully submitted,

LINDA F. DONALDSON
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

October 8, 1976

July 20, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATHRA NADER and ALBERT C. SNYDER, JR.	:	
	:	CIVIL ACTION
vs.	:	NO. H-76-20
GLORIA SCHAFFER, Secretary of the State of Connecticut; DEMOCRATIC PARTY OF THE STATE OF CONNECTICUT and REPUBLICAN PARTY OF THE STATE OF CONNECTICUT	:	

JUDGMENT

The above-identified action came on for consideration before a three-judge district court; the Honorable Robert P. Anderson, United States Circuit Judge, and the Honorables T. Emmet Clarie and M. Joseph Blumenfeld, United States District Judges, presiding; and,

This cause having been fully heard and a decision having been rendered denying the Plaintiffs' Motion for Summary Judgment and granting the Defendants' Motion to Dismiss;

It is accordingly ORDERED and ADJUDGED that the Plaintiffs' Complaint be and is hereby dismissed.

Dated at Hartford, Connecticut, this 20th day of July, 1976.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court
By: /s/ William D. Templeton
Deputy-in-Charge

[Filed: July 14, 1976]

* * * *

MEMORANDUM OF DECISION

Before: ANDERSON, Circuit Judge, CLARIE, Chief District Judge, and BLUMENFELD, District Judge.

ANDERSON, Circuit Judge:

Plaintiffs, Nathra Nader and Albert C. Snyder, Jr., are residents of Winchester, Connecticut. Each has registered as a voter pursuant to Conn. Gen. Stat. §§9-20 and 9-21. The basis for this action, brought under 42 U.S.C. §1983, with jurisdiction based on 28 U.S.C. §§1343(3) and 1343(4), to redress the alleged deprivation, under color of state statute, of certain voting and associational rights guaranteed by the federal Constitution, is that plaintiffs refuse to enroll in a political party pursuant to Conn. Gen. Stat. §9-56 or 9-59 and are, therefore, prohibited from voting in any party primary elections. Because the complaint seeks an order restraining the enforcement of Conn. Gen. Stat. §9-431 on the grounds of its alleged unconstitutionality, and because the constitutional question raised is not "insubstantial," this three-judge court was convened. 28 U.S.C. §2281; *Goosby v. Osser,* 409 U.S. 512 (1973). Plaintiffs have moved, with supporting affidavits, for summary judgment. Defendants, the Secretary of the State of Connecticut, and the Republican and Democratic Parties of Connecticut, have moved to dismiss the complaint. The motion to dismiss is granted and the motion for summary judgment is denied.

Connecticut Gen. Stat. §9-431 provides in pertinent part:

> "*Eligibility to vote at primary.* No person shall be permitted to vote at a primary of a party

> unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be . . . ."

Plaintiffs' complaint alleges that the actions of the defendant Secretary of the State[1] and her agents in enforcing §9-431, pursuant to §§9-3, 9-4, 9-5, and 9-439, violate plaintiffs' rights in the following manner: (1) by denying them the right to vote in primary elections while extending this right to enrolled party members, deprives plaintiffs of their Fourteenth Amendment right to equal protection of the law; (2) by compelling them either to enroll in a political party or forego a right to vote in a primary election impermissibly forces plaintiffs to choose between a right to vote, on the one hand, and the right freely to associate for the advancement of political ideas, on the other; the latter includes the right to associate with a particular candidate regardless of the candidate's party affiliation; and (3) infringes plaintiffs' right to vote, as guaranteed by Article I, Section 2, cl. 1 and the Fourteenth and Seventeenth Amendments, by preventing plaintiffs from participating in an "integral part" — the primary elections — "of the process by which their United States Senators and Representatives are chosen."

They allege further that "primary elections . . . constitute an integral part of the process established by the State of Connecticut for selecting individuals who will represent and govern plaintiffs in federal, state and local office," and therefore request an order declaring that §9-431 is unconstitutional insofar as it prohibits them from voting in primary elections; and enjoining the Secretary of the State from enforcing §9-431 so as to prohibit them from so voting.[2]

Connecticut's Primary Election System

Connecticut law divides potential candidates for office into three categories: those of "major parties," those of "minor parties," and independents or "petitioning parties."[3] The candidates of the major and minor parties are afforded spaces on the ballot for the general election; other candidates may have their names appear on the ballot by fulfilling the petition requirements of §§9-453a through 9-453s. Conn. Gen. Stat. §9-379.

Initially, state or district conventions, as the case may be, of a major party "choose a candidate for nomination to each state or district office" through a "challenge primary" system. Conn. Gen. Stat. §9-382. Party candidates for municipal office, members of party town committees, and delegates to party conventions, are chosen in each municipality, according to rules prescribed by the party, either by a party caucus, a party convention, or the town committee. Conn. Gen. Stat. §9-390. If the candidate so chosen is not opposed, he becomes the party's candidate in the general election, and no primary election is held. Conn. Gen. Stat. §§9-408 and 9-409. A non-endorsed candidate, however, may force a primary if he meets the three criteria specified in Conn. Gen. Stat. §9-400, which are that he must (1) have received at least twenty percent of the votes of the delegates to the party convention present and voting on any roll call; (2) deposit with the Secretary of the State a sum of money equal to five percent of the salary of the office he seeks; and (3) file with the Secretary of the State a petition bearing signatures of a certain number of enrolled party members residing in the jurisdiction under contest, as specified by §9-400. (For example, a challenger for a statewide office

would require 5000 signatures; a challenger for a congressional district office would require 2000 signatures.) It should be noted that plaintiffs seek to participate only in this last step of the nominating process, *i.e.*, the primary election to choose candidates for public offices; they do not seek to participate in party caucuses or conventions, or in the selection of town committee members or convention delegates.

Minor parties are required only to nominate their candidates in a manner prescribed in the party's own rules, which must be filed with the Secretary of the State. Conn. Gen. Stat. §9-451. Candidates not nominated by either a major or minor party can get on the ballot by presenting to the Secretary of the State a petition bearing signatures equal to one percent of the votes cast for the same office at the last preceding election. Conn. Gen. Stat. §9-453d.

Enrollment in a political party is, as plaintiffs assert, a public act of affiliation with the party, at least insofar as the voter is required by Conn. Gen. Stat. §9-56 to appear before the registrar of voters, approximately eighteen days before the election, and execute a form giving his name, address, desired party affiliation, any affiliations or requests for affiliations (enrollments) with other parties within the previous six months and the date on which any application had been made for erasure from enrollment in any party, Conn. Gen. Stat. §9-56; and the enrollment lists are public records, Conn. Gen. Stat. §9-55. An unaffiliated voter may enroll in a party and participate in a primary election as late as the third Saturday before its occurrence. Conn. Gen. Stat. §9-56. A voter who is enrolled in a party may at any time apply for erasure from that party's enrollment

list, and for transfer to the enrollment list of another party, but he may not vote in any primary for six months following the date of the application for transfer. Conn. Gen. Stat. §9-59.

DISCUSSION

Plaintiffs' principal argument[4] is that participation in a primary election is an exercise of the constitutionally protected right to vote and of the constitutionally protected right to associate with others in support of a candidate. They also assert that to the latter there is a constitutionally protected correlative right *not* to associate, and to be free from coerced association. They further claim a constitutionally protected right of privacy of association. Plaintiffs wish to exercise both of these claimed sets of rights, but §9-431 limits them to one or the other; that is, in order to vote in a party's primary election, plaintiffs must enroll in the party, while on the other hand, if they maintain their stand against enrollment, they are precluded.

The fact that plaintiffs do not enroll in the Democratic or Republican Parties does not prevent them from working in support of or contributing money to their favorite candidates within these Parties or candidates in other major or minor parties; or from giving such support to independent candidates, including themselves. Moreover the plaintiffs are not prevented from signing the petitions of independents or participating in a minor party's candidate selection process as it is established by the party's rules under §9-451. Connecticut's voting laws clearly provide avenues for supporting candidates of one's persuasion without affiliating with an established "major" political party.

Plaintiffs argue that the alternative avenues of political activity open to them under Connecticut law are ineffectual and unrealistic, since in most general elections, only the Democratic and Republican nominees have reasonable probabilities of success. While plaintiffs' contention may generally hold true for national and many statewide elections, both minor party and independent candidates may reasonably anticipate a measure of success in local elections.[5] In any event, any dominant position enjoyed by the Democratic and Republican Parties is not the result of improper support, or discrimination in their favor, by the State. Rather, the two Parties enjoy this position because, over a period of time, they have been successful in attracting the bulk of the electorate, so that they now have substantial followings.

A "major party" embraces a substantial fraction of the total electorate, who have associated together for the purpose of nominating and working for the election of candidates who, as officeholders, will implement the members' political views. "Success" in this endeavor, such as the major parties have achieved, is the ultimate goal of the members' political activities, and does not necessarily call for strict constitutional scrutiny by the judiciary so as to increase the political strength of those who have not actively attempted to advance their political views.

Improper State support for the Democratic and Republican Parties cannot be inferred from the fact that their primary elections are closely regulated by statute. In the past, many political nominations were made by a process which both the plaintiffs and amicus curiae[6] briefs have described as the "smoke-filled room." Many states, such as Connecticut, have enacted statutes calling

for nomination by primary election, presumably because they find it beneficial to allow the general party membership a voice in the nominating process. See *Bullock v. Carter,* 405 U.S. 134, 148 (1972). The states also recognize the frequency of electoral success achieved by the Democratic and Republican Parties, and the desirability of having a regularized system for making these Parties' nominations, which are so important to the ultimate selection of governmental leaders. Each state legislature chooses the primary election scheme that it thinks will best promote democratic, electoral and governmental goals. In Connecticut, major party primaries are the subject of detailed regulation, while the nominating processes of minor and petitioning parties are more loosely controlled; this reflects the fact that the State is particularly concerned with the parties which have demonstrated some probability of success in the general election and whose candidates may become holders of public office. Cf. *Buckley v. Valeo,* U.S. , , 44 U.S.L.W. 4127, 4155 (U.S., Jan. 30, 1976), and *Jenness v. Fortson,* 403 U.S. 431, 442 (1971) (legislature can require candidate to demonstrate a "significant modicum of support" before, respectively, distributing public funds to him, or placing his name on the ballot).

Further there is at least plurality in Connecticut — it is not a "one-party" state — and thus no one party's primary election is completely determinative of the outcome. Compare *United States v. Classic,* 313 U.S. 299 (1941).

With regard to the claimed right not to associate, it is true that, in order to vote in a party's primary, plaintiffs must publicly affiliate with that party. But enrollment in Connecticut imposes absolutely no affirmative party obligations on the voter, in terms of time or money, and it

does not even obligate him to vote for the party's positions or candidates or to vote at all. The voter's name, however, may be erased from the party's enrollment list on a proper showing that he does not support the party's principles or candidates. Conn. Gen. Stat. §§9-60, 9-61; but in actual practice these statutes are not used. Such limited public affiliation is simply not comparable to the coerced orthodoxy imposed by government officials in the cases cited by plaintiffs, such as *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943); and *Russo v. Central School District No. 1,* 469 F.2d 623 (2 Cir. 1972), *cert. denied,* 411 U.S. 932 (1973). (Even if it is assumed that some affiliation is "coerced" by §9-431, the voter at least may choose his party, whereas in the cases just listed there was no such choice.)

Plaintiffs also claim that the public nature of enrollment violates their right to privacy of association by potentially subjecting them to harassment because of their affiliations with a party. It is insufficient, however, for plaintiffs merely to raise the spectre of harassment; instead, they must make a detailed factual showing of actual threats or incidents of harassment. Compare *Buckley v. Valeo, supra,* 44 U.S.L.W. at 4147-48 with *NAACP v. Alabama,* 357 U.S. 449, 462 (1958). Cf. *Doe v. Martin,* 404 F. Supp. 753 (D.D.C. 1975) (three-judge court); *Laird v. Tatum,* 408 U.S. 1 (1972) (allegations of subjective "chill" are not an adequate substitute for a claim of presently existing, specific harm or a threat of specific future harm to plaintiff, so as to create a case or controversy in suit challenging Army's intelligence-gathering activities). At least one form of potential harassment suggested by plaintiffs — loss of civil service employment due to political affiliation — cannot necessarily be considered a realistic

threat since this practice was recently declared unconstitutional by the Supreme Court, as least as to patronage employees in non-policymaking positions. *Elrod v. Burns,* U.S. , 44 U.S.L.W. 5091 (U.S., June 28, 1976).

The State, plaintiffs assert, may not force them to comply with §9-431 unless the State establishes that it "serves a compelling state interest by the least drastic means available," citing *Dunn v. Blumstein,* 405 U.S. 330 (1972), and that "No state interest served by Conn. Gen. Stat. §9-431 is sufficiently compelling to justify depriving plaintiffs of their constitutional rights."

A political party, however, is a voluntary association, instituted for political purposes, with the goal of effectuating the will of its members. *Ray v. Blair,* 343 U.S. 214, 222 n. 9 (1952); *Alcorn ex rel. Dawson v. Gleason,* 10 Conn. Supp. 210, 217 (Hartford County Court of Common Pleas 1941); see also *Fields v. Osborne,* 21 A. 1070, 1071, 60 Conn. 544 (1891). The party's ultimate goal, in the electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. See *Ripon Society v. National Republican Party,* 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc); Comment, 40 U. CHI. L. REV. 636, 654 (1973); Note, 27 RUTGERS L. REV. 298, 303-05 (1974). Plaintiffs agree with this description of political parties; they state that it is a function of parties "to form coalitions of interest groups, providing their members access to power and facilitating the passage of legislation once a party has achieved office." In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its

members') policies and philosophies. The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.

Because the political party is formed for the purpose of engaging in political activities, constitutionally protected associational rights of its members are vitally essential to the candidate selection process. *Cousins v. Wigoda,* 419 U.S. 477, 487 (1975); *O'Brien v. Brown,* 409 U.S. 1, 4 (1972) (per curiam); *Ripon Society v. National Republican Party, supra;* Note 27 RUTGERS L. REV. 298 (1974). The *Ripon Society* case notes that party members also have a "right to organize a party in the way that will make it the most effective political organization," 525 F.2d at 586. An attempt to interfere with a party's ability so to maintain itself is simultaneously an interference with the associational rights of its members, *id.* at 585; see also *Buckley v. Valeo, supra,* 44 U.S.L.W. at 4133, and *Cousins v. Wigoda, supra,* 419 U.S. at 487-88, all of which cite *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957) (plurality opinion). The rights of party members may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process. 525 F.2d at 588; see also *Cousins v. Wigoda, supra,* 419 U.S. at 487. More importantly, party members are entitled to affirmative protection of their associational rights, see Note, 27 RUTGERS L. REV. 298 (1974). A party, were it a completely private organization with no government regulation, could limit participation in its nominating process to party members. In the regulated situation, the state has a legitimate interest in protecting party members' associational rights, by legislating to protect the party "from intrusion by those with adverse political principles."

Ray v. Blair, supra, 343 U.S. at 221-22; see also *Lippitt v. Cipollone,* 337 F. Supp. 1405, 1406 (N.D. Ohio 1971) (three-judge court) (per curiam), *aff'd mem.,* 404 U.S. 1032 (1972); *Green v. State of Texas,* 351 F. Supp. 143, 145 (N.D. Tex. 1972) (three-judge court) (per curiam).

In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 RUTGERS L. REV. 298 (1974), and Comment, 40 U. CHI. L. REV. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as *Rosario v. Rockefeller,* 410 U.S. 752 (1973); *Storer v. Brown,* 415 U.S. 724 (1974); and *American Party of Texas v. White,* 415 U.S. 767 (1974).

These well established principles are applicable here. *Ray v. Blair, supra,* involved an Alabama primary election system regulated by state statute and carried out at state expense. State party executive committees were given the power to fix political or other qualifications of party members and candidates. The Democratic Party required candidates for Party nomination to sign a pledge stating they would aid and support the Party's ultimate nominees. This was challenged on equal protection, due process, and

other constitutional grounds, but the Supreme Court upheld the pledge requirement and stated that it "protect[ed] a party from instrusion by those with adverse political principles," 343 U.S. at 221-22, and that "A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party," *id.* at 227. In specifically disposing of the equal protection and due process claims, the Court stated, *id.* at 226 n. 14:

> "[T]he requirement of this pledge, unlike the requirement of color, is reasonably related to a legitimate legislative objective — namely, to protect the party system by protecting the party from a fraudulent invasion by candidates who will not support the party . . . . In facilitating the effective operation of democractic government, a state might reasonably classify voters or candidates according to party affiliations . . . . This requirement of a pledge does not deny equal protection or due process."

Although, as plaintiffs note, *Ray v. Blair,* involved a party loyalty oath for *candidates* for party office, not one for *voters* in a party election, but the language and reasoning of the Court's opinion imply the validity of a similar requirement, binding members of a party to vote only for a party member as the party's candidate, to run in the ensuing national, state, county or municipal election. Any elector in Connecticut may, however, in the subsequent general election vote for any party's candidate or an independent, as he chooses, and there is no way to compel him to disclose for whom he voted.

Relying on *Ray v. Blair*, a three-judge court in *Lippitt v. Cipollone, supra*, 337 F.Supp. at 1406, upheld Ohio statutes designed to prevent raiding of one party by members of another party, and to preclude candidates from altering their political party affiliations for opportunistic reasons. The court stated that the protection of parties (within their respective party organizations) from intrusion by those with adverse political principles was a legitimate legislative goal.

The Supreme Court ruled in *Storer v. Brown, supra*, that California could bar from the ballot an independent candidate who within the previous year had been a member of a party; this law did not discriminate against such independent candidates, because candidates for *party* nomination were similarly disqualified if they belonged to a *different* party within the previous year. 415 U.S. at 733-34. In both *Storer*, 415 U.S. at 740-41, and *American Party of Texas v. White, supra*, 415 U.S. 767, the Court upheld state laws which barred voters who had already participated in a party's nominating process from signing the nominating petitions of other parties.

A three-judge court in *Green v. State of Texas, supra*, at 145, held constitutional certain sections of the Texas Election Code which "prohibit electors who vote for a candidate for one office in a particular party primary from voting in another party primary for a candidate running for a different office." The court stated:

> "Far from abridging federal rights, the Texas statutes here under review serve to protect the political rights of Texans to join political parties and to enjoy the free right of association appurtenant thereto with some protection against

> raids and interference from independents or members of other political parties."

In *Rosario v. Rockefeller, supra*, the Supreme Court upheld New York's "delayed enrollment" scheme which barred voters from participation in a primary election unless they were enrolled in the party prior to the preceding general election – a requirement which resulted, in practice, in "waiting periods" of up to eleven months. Affirming a decision of the Second Circuit, 458 F.2d 649 (1972), the Court ruled that this scheme was properly tailored to prevent "raiding," a practice "whereby voters in sympathy with one party [7] designate themselves as voters of another party so as to influence or determine the results of the other party's primary," 410 U.S.C. at 760. The scheme, therefore, was tied to the "legitimate and valid state goal" of "preservation of the integrity of the electoral process." *Id.* at 761.

As we have noted, the phrase "preservation of the integrity of the electoral process" contemplates, in the nominating context, the assurance that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies, and goals of the party. The phrase contempates the prevention of fraud in the nominating process, and a candidacy determined by the votes of non-party members is arguably a fraudulent candidacy. See *Rosario v. Rockefeller*, 458 F.2d 649, 652 (2 Cir. 1972), *aff'd*, 410 U.S. 752 (1973).

It is clear from these cases that, in order to protect party members from "intrusion by those with adverse political principles," and to preserve the integrity of the electoral process, a state legitimately may condition one's

participation in a party's *nominating* process on some showing of loyalty to that party, and that is precisely what Connecticut does in §9-431. The enrollment process of §9-56 is not particularly burdensome, and it is a minimal demonstration by the voter that he has some "commitment" to the party in whose primary he wishes to participate. It does not constitute anything in the nature of an absolute barrier to voting in a primary election because it is beyond the capabilities or powers of an elector to perform as was the case in *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement), and *Smith v. Allwright*, 321 U.S. 649 (1944) (blacks barred from participation in primary elections). Compare *Rosario v. Rockefeller*, 410 U.S. 752 (1973). And if plaintiffs choose not to associate, by not enrolling in a party, their right to vote in the *general* election is unaffected. Cf. *Ripon Society v. National Republican Party*, *supra*, at 586, 588-89.

Plaintiffs argue that §9-431 does not accomplish legitimate state goals because the "waiting period" for persons who are independent voters, is less than three weeks, and this is an insufficient period to deter fraudulent or deceptive conduct by those planning it. But this argument goes only to the length of the waiting period, and not to the method used. The Connecticut legislature has determined that enrollment approximately three weeks before the primary election is sufficient to demonstrate that a previously independent voter will not, in voting, engage in disruptive or deceptive conduct inconsistent with the associational rights of other party members and the preservation of the integrity of the nominating process. The legislature has, with some logic, imposed a longer waiting period on voters previously enrolled in

other parties, as they are perhaps more likely to have a hostile motivation. We fail to see how plaintiffs' position gains any support from the Connecticut legislature's decision not to impose the maximum waiting periods permitted by the Constitution.

Plaintiffs' claim that Connecticut could prevent raiding and other distortive and deceptive conduct by a less drastic means, namely, criminal sanctions against the perpetrators, is not persuasive. Assuming *arguendo* that the "least drastic means" test applies here, that standard does not require the State to choose ineffectual means to accomplish its goals. *Storer v. Brown, supra,* 415 U.S. at 736. *Rosario v. Rockefeller, supra,* 410 U.S. at 762 n. 10. Although criminal sanctions might be effective to punish the ringleaders of any raiding episode, it would be very difficult to detect and punish all the individual voters who engaged in the proscribed conduct, particularly given the secrecy of the ballot and the difficult specific intent issues which would be involved. See Note, 27 RUTGERS L. REV. 298, 311 (1974). Unless the deterrent aspect of the criminal law were totally effective, such a law would apply only after the damage had been done to the electoral process and would be in the nature of punishment *not remedy*.

The State obviously cannot conduct a test on each voter to determine his political ideas before allowing him to vote in a primary election, and the enrollment requirement of §9-431 is a constitutionally acceptable surrogate. And given the State's legitimate interest in legislating to protect the associational rights of party members, which rights include the right to put forward candidates who adhere to and symbolize the party's views, §9-431 recognizes the simple fact that, "No matter how loyal the

nominee, if he is chosen by those not in sympathy with the party, he is not that party's nominee." Note, 27 RUTGERS L. REV. 298, 311 n. 106 (1974). Cf. *Bendinger v. Ogilvie*, 335 F. Supp. 572, 576-77 (N.D. Ill. 1971) (three-judge court).

From the party's point of view, enrollment also serves an important housekeeping function. Candidates need to know who is in the electorate, so that they (the candidates) can attempt to persuade those individuals to vote for them. Party members who wish to establish, as party policy, a particular course of conduct through the election of a particular candidate, similarly need to know who their supporters are. It is common experience that direct solicitation of party members – by mail, telephone, or face-to-face contact, and by the candidates themselves or by their active supporters – is part of any primary election campaign. But, without the public list of party members which is provided by the enrollment process, such electioneering would become quite difficult. The enroll- requirement of §9-431, coupled with the three-week waiting period of §9-456, allows compilation of a list — at the start of the final, crucial weeks of campaigning — of the concerned electorate.

Plaintiffs also argue that §9-431 deprives them of the equal protection of the laws by denying to them the right to participate in elections in which they are "interested" and by which they are "affected," to the same extent as those persons who *may* vote, solely because plaintiffs do not enroll in political parties. Authority cited in support of this argument includes *Hill v. Stone*, 421 U.S. 289, 295-98 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 207-13 (1970); *Cipriano v. City of*

Houma, 395 U.S. 701, 706 (1969) (per curiam); and *Kramer v. Union Free School District*, 395 U.S. 621, 632-33 (1969). Although plaintiffs are "interested" in and "affected" by the ultimate selection of their governmental leaders, they are *not* "interested" in primary elections in the crucial, distinguishing aspect that party members are interested. Namely, plaintiffs are *not* "interested" in nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies. Plaintiffs' refusal to join any of these voluntary associations, which are organized for the purpose of effectuating their members' political goals, is fundamentally inconsistent with any claim that plaintiffs are as "interested" as party members in the outcome of the party nominating process. The constitutional validity of this distinction between enrolled party members and all other voters, on which §9-431 is based, is at least implicit in the Supreme Court's flat statement in *Ray v. Blair, supra*, that "a state might reasonably classify voters or candidates according to party affiliations." Section 9-431, therefore, does not make an "invidious discrimination" which would offend the Constitution, *American Party of Texas v. White, supra*, 415 U.S. at 781; *Jenness v. Fortson*, 403 U.S. 431 (1971); *Lippitt v. Cipollone, supra*, 337 F. Supp. at 1406. Cf. *Pirincin v. Board of Elections of Cuyahoga County*, 368 F. Supp. 64, 70 (N.D. Ohio) (three-judge court), *aff'd mem.*, 414 U.S. 990 (1973):

> "[T]o the extent Ohio's election laws limit the right to participate in a party primary or be a candidate for political office, a person is excluded by reasonable restriction but not by a political caste system. There can be no discrimination of

> constitutional proportion when a man refrains from entering a party primary of one of the two major political parties because he regards himself an independent or a member of a minority party."

"Not every limitation or incidental burden on the exercise of voting rights is subject to a strict standard of review." *Bullock v. Carter,* 405 U.S. 134, 143 (1972), citing *McDonald v. Board of Election Commissioners,* 394 U.S. 802 (1969). Similarly, a state statute or policy must cause more than a minimal infringement of First Amendment rights before a state is called upon to provide a "compelling interest" justification. See, *e.g., Connecticut State Federation of Teachers v. Board of Education Members,* ___ F.2d ___ (No. 75-7436, 2 Cir., May 21, 1976), and authorities cited therein. In *Storer v. Brown, supra,* 415 U.S. at 729, the Supreme Court stated:

> "[A]ppellants . . . . assert that under [certain Court decisions], *substantial* burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest . . . . It has never been suggested that [the rule of these decisions] automatically invalidates every *substantial* restriction on the right to vote or to associate." (Emphasis supplied.)

There must be more than a minimal infringement on the rights to vote and of association, therefore, before strict

judicial review is warranted. See *Buckley v. Valeo, supra,* and *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 567 (1973) ("neither the right to associate nor the right to participate in political activities is absolute"); *Kusper v. Pontikes,* 414 U.S. 51, 58 (1973) ("a *significant* encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest") (emphasis added).

We, therefore, conclude that §9-431 is reasonably related to the accomplishment of legitimate state goals. *Rosario v. Rockefeller, supra,* 410 U.S. at 762.

Plaintiffs, in their argument, have pointed to several perceived flaws in the primary election system which the Connecticut legislature has established. It is asserted, for example, that, "There are, moreover, reasons to believe that if independent voters were able to vote in primary elections, the stability of the political system would actually be enhanced"; and that participation by independent voters in primary elections "will benefit the two-party system by drawing more citizens into the political process at this crucial stage." They also argue that it is "irrational" for the legislalture "to presume" that "independent voters are at all likely to engage in raiding," and, as discussed *supra,* that §9-56 is an ineffective device to bar deceptive conduct by those independents who wish to engage in it. The Secretary of the State, meanwhile, in her argument, has pointed out that, should plaintiffs prevail here, Connecticut would be forced to choose among a number of other types of primary systems, e.g., the "crossover" primary, the "blanket" primary, or the "multiple vote" primary. The amicus curiae brief states that

> ". . . a major factor in the increase in proportion of unaffiliated voters is the discontent and dissatisfaction of large numbers of citizens with the political parties . . . ,"

and that excluding independent voters from participation in primary elections serves to increase the feeling of these citizens that they are excluded from an important part of the political process. The amicus brief declares that §9-431 actually "hinders the operation of the democratic process in an enlightened society such as we enjoy in the State of Connecticut," and asserts that "[n]o political party can derive real strength" from this statute which "compels citizens to affiliate in order to exercise their constitutional rights."

The comparative merits of various forms of primary election systems have been widely debated in this presidential election year. In particular, the "open" and "crossover" primaries, which permit independents and/or members of other parties to participate in a given party's primary, have been the subject of controversy.[&]

A state may legislate to prevent the perceived evils of crossover voting, *e.g., Rosario v. Rockefeller, supra,* but several states permit crossover voting in their primaries. Others have provision for primaries which allow participation by independents and members of other parties. There is no suggestion that such a clause makes the election laws unconstitutional, nor is it a mandatory prerequisite to constitutionality that independent, non-member electors be permitted to vote in a party's primary. The Connecticut General Assembly has adopted statutes governing political party primaries which it considers best meet the needs of the State. The laws are not invidiously

discriminatory but apply to all alike. The legislatures of "[t]he states have broad discretion in formulating election policies." *Tansley v. Grasso,* 315 F. Supp. 513, 519 (D. Conn. 1970) (three-judge court), citing *Williams v. Rhodes,* 393 U.S. 23, 34 (1968); *United States v. Classic,* 313 U.S. 299, 311 (1941); and *Voorhes v. Dempsey,* 231 F. Supp. 975, 977 (D. Conn. 1964) (three-judge court) (per curiam), *aff'd mem.,* 379 U.S. 648 (1965). Accord, *Bullock v. Carter, supra,* 405 U.S. at 141; see also *Storer v. Brown, supra,* 415 U.S. at 729-30 and 736.

We, therefore, hold that the election laws of the General Statutes of the State of Connecticut, governing primaries are not in violation of the Constitution of the United States, that they provide for legitimate goals through constitutionally permissible means and that there is no need or occasion for the judicial relief requested by the plaintiffs.

The record does not disclose that the plaintiffs at any time have sought to have the primary election statutes changed to conform more closely to their views. The laws, as they are now, are not immutable; and, if the plaintiffs, as they imply, are speaking for a generous one-third of the entire electorate of the State of Connecticut, they should, by using the simple and direct means provided by §§9-453a-453s, be able to get one or more of their number on the ballots and, through diligent and thorough campaigning, elect one or more representatives in the legislature. Theoretically the laws are still made by the legistatures and, although the effort to achieve a change in the statutes requires a great deal of time, hard work and infinite patience, it is not impossible. The presently popular course of raising a federal constitutional question and seeking a change in the law by judicial fiat, is quicker,

more academically attractive and perhaps more thorough. But such action tends in itself to work in derogation of the separation of powers and our democractic system of government. The courts should not use this power for the purpose of exercising "some amorphous general supervision of the operations of government," *United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring), but only to redress violations of basic human rights to which federal constitutional protections have been extended or to correct governmental action which otherwise conflicts with express provisions of the Constitution. The plaintiffs' case does not fall within these designations.

The defendants' motion tc dismiss is granted and the plaintiffs' motion for summary judgment is denied. Judgment may enter accordingly.

Dated at Hartford, Connecticut, this 14th day of July, A.D. 1976.

/s/ Robert P. Anderson
United States Circuit Judge

/s/ T. Emmet Clarie
Chief United States District Judge

/s/ M. Joseph Blumenfeld
United States District Judge

Footnotes:

1. Plaintiffs' original complaint, filed January 15, 1976, named only Secretary of the State Schaffer as a defendant. Subsequently, after a "Motion by Defendant to Bring in Additional Defendants," the Republican and Democratic Parties of Connecticut were added as defendants.

2. The request for certification of this case as a class action, with the class comprised of "all those registered voters of the State of

Connecticut who are not enrolled in any political party and who are therefore barred from voting in primary elections," was withdrawn because counsel for the Secretary of the State stipulated at the hearing on the merits that this court's ruling on the validity of §9-431 would not be limited to plaintiffs Nader and Snyder but would be given statewide application.

3. A "major party" is one (a) whose candidate in the last preceding gubernatorial election received at least twenty percent of the total votes for that office; *or* (b) whose candidate for the office in question received, at the last preceding regular election for that office, at least ten percent of the total votes. Conn. Gen. Stat. §9-372(e). A "minor party" is one whose gubernatorial candidate received less than twenty percent of the total vote in the last preceding election; *and* whose candidate for the office in question received less than ten percent but at least one percent of the total vote for that office in the past preceding election. Conn. Gen. Stat. §9-372(f). Independents or "petitioning parties" are candidates or parties who have qualified for nomination for elective office pursuant to the provisions of §§9-453(a) through 9-453(s), inclusive, or in instances of nominations for vacancy elections for the offices of state senator or state representative, as provided in §9-216.

4. We agree at the outset with plaintiffs, that constitutional standards must be satisfied in primary as well as in general elections, Smith v. Allwright, 321 U.S. 649, 661 (1944); cf. Moore v. Ogilvie, 394 U.S. 814, 818 (1969); and that the Secretary of the State's actions which are complained of are taken under color of state law for purposes of 42 U.S.C. §1983, Bullock v. Carter, 405 U.S. 134, 140 (1972); Gray v. Sanders, 372 U.S. 368, 374-75 (1963); State of Georgia v. National Democratic Party, 447 F.2d 1271, 1276 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971).

Although plaintiffs cite several cases for the proposition that there is a "right" to vote in primary elections, these cases do not hold that there is a right to vote in primary elections even though the voter refuses to comply with constitutionally legitimate rules and requirements of party membership. Indeed, the leading case of Smith v. Allwright, *supra,* involved a primary election system, established by state statute, under which party membership was

"the essential qualification for voting in a primary to select nominees for a general election," *id.* at 664. The petitioner there did not question the party membership requirement, but successfully challenged as unconstitutional his exclusion from Democratic Party membership on the basis of race. It must be presumed that the petitioner was ready, willing, and able to satisfy all other prerequisites for party membership (see 131 F.2d 593, 594 (5 Cir. 1943) (per curiam)), which included a party loyalty oath, 321 U.S. at 653-54 n. 6, because, had he not satisfied all other valid party membership requirements, he would have lacked standing to raise the racial issue. Cf. Storer v. Brown, 415 U.S. 724, 736-37 (1974); Clark v. Rose, 531 F.2d 56, 58 (2 Cir. 1976) (per curiam).

5. In terms of the ease of access to the ballot which the Connecticut statutes provide for parties other than the Republican and Democratic Parties, and persons who are not candidates of those Parties, it is interesting to note that, in the 1970, 1972, and 1974 elections, a total of nine candidates who were neither Republican nor Democratic achieved "major party" status. Further, from 1966 through 1974, a total of sixty candidacies achieved "minor party" status. And from 1966 through 1975, a total of 969 candidates gathered a number of petition signatures sufficient under §9-543d to entitle them to be placed on the ballot for the general election.

6. On June 22, 1976 this court granted United States Senator Lowell P. Weicker, Jr.'s motion for leave to file an amicus curiae brief.

7. The Court did *not* say, "voters who are *members* of one party . . . ." It thus left open the possibility that independent voters, as well as members of other parties, could be guilty of "raiding." But see Echevarria v. Carey, 402 F. Supp. 183, 188 (S.D.N.Y. 1975).

8. See, e.g., Editorial, "Adulterated Choice," New York Times, May 25, 1976, at 34, col. 1; M.S. Forbes, Jr., "Wallacites and the GOP," *Forbes,* June 1, 1976, at 19; Barone, "That 'Crossover' Nonsense," Washington Post, May 16, 1976, at C-7; Herbers, "Crossover Voting Makes Primaries More General," New York Times, May 16, 1976, §IV, at 2; Rovere, "Letter From Washington," *The New Yorker,* June 21, 1976, at 90-91. See generally Note, 27 RUTGERS L. REV. 298 (1974), and Comment, 40 U. CHI. L. REV. 636 (1973).

[Filed: August 13, 1976]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[Caption]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Nathra Nader and Albert C. Snyder, Jr., appeal to the Supreme Court of the United States from the judgment of the three-judge court entered in this action on July 20, 1976. The court denied plaintiffs' motion for summary judgment, thereby denying plaintiffs a permanent injunction against the enforcement of Conn. Gen. Stat. §9-431, and granted defendants' motion to dismiss. Appeal is taken pursuant to 28 U.S.C. §1253.

Dated: Washington, D.C.
August 13, 1976

Respectfully submitted,

/s/ William Clendenen

William Clendenen
152 Temple Street, Suite 310-11
New Haven, Connecticut 06510

/s/ Linda F. Donaldson

Linda F. Donaldson

/s/ Alan B. Morrison (by L.F.D.)

Alan B. Morrison
Suite 700; 2000 P St., N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Plaintiffs

[Filed: May 6, 1976]

* * * * *

AFFIDAVIT OF NATHRA NADER

NATHRA NADER, being duly sworn, hereby deposes and says:

1. I, Nathra Nader, am a citizen of the United States and a bona fide resident of the Township of Winchester, Connecticut. I am presently registered to vote in Winchester and have been so registered for over fifty years.

2. I have in the past voted in Winchester in federal, state and local general elections.

3. I am not now and have never been enrolled as a member of any political party, including the two major political parties who are defendants in this case. I refuse as a matter of principle to join either of the major political parties or any other political party. Such affiliation would be contrary to my beliefs, particularly in view of the fact that a record of my affiliation would be public under Connecticut law.

4. By virtue of the fact that I have refused to enrol in a political party, I have in the past been denied the right to vote in those primary elections in the State of Connecticut in which candidates for public office are nominated. I have therefore been unable to vote for certain candidates whom I preferred to the candidates eventually selected as nominees for public office. I would like to vote in those primary elections and thereby to support candidates of my choice.

5. I believe that it is my right as an American citizen to participate equally with other citizens in the selection of the officials who will govern or represent me in public

office and that I should not be denied that right because others choose to join a political party and I do not.

/s/ Nathra Nader
Nathra Nader

[Notary Seal]

[Filed: May 6, 1976]

* * * * *

AFFIDAVIT OF ALBERT C. SNYDER, JR.

ALBERT C. SNYDER, JR., being duly sworn, hereby deposes and says:

1. I, Albert C. Snyder, Jr., am a citizen of the United States and a bona fide resident of the Township of Winchester, Connecticut. I am presently registered to vote in Winchester.

2. I first registered to vote in 1945 in Bloomfield, Connecticut. Between 1945 and 1974, I changed my town of residence several times, but always lived within the State of Connecticut. In 1974, I moved to Winchester. In all of these towns, I have voted in federal, state and local general elections.

3. In each of the towns where I lived between 1945 and 1974, I enrolled as a member of the Republican Party. I enrolled as a Republican because that party was the predominant party in each of the towns where I lived, and because the candidates of the Republican Party best represented my views on issues during those years.

4. In 1974, when I moved to Winchester, I decided to become an independent voter and did not enrol with a party. I refused to enrol because I had become convinced that there is no difference between the Republican and

Democratic Parties. The Watergate episode also convinced me that our present political system makes candidates so dependent on their party's support for assurance of election or re-election that they become unwilling to be honest or to take independent stands on issues. I did not want to be a member of a party under these circumstances.

5. I believe that under the present system, I am given little real choice between candidates when I vote in a general election. The percentage of registered voters who do not vote on election day convinces me that other voters also feel they have no choice.

6. Because I am not enrolled in a party, I am now denied the right to vote in those primary elections in the State of Connecticut in which candidates for public office are nominated. I am therefore unable to support fully certain candidates whom I prefer, but who may suffer defeat in the primary election. I would like to vote in those primary elections and thereby to support candidates of my choice.

7. I believe that it is my right as an American citizen to participate equally with other citizens in the selection of the officials who will govern or represent me in public office and that I should not be denied that right because others choose to join a political party and I do not.

/s/ Albert C. Snyder, Jr.

Albert C. Snyder, Jr.

[Notary Seal]

IN THE

Supreme Court of the United States

October Term, 1976

Docket No. 76-504

NATHRA NADER and ALBERT C. SNYDER, JR.,
Appellants,

—v.—

GLORIA SCHAFFER, Secretary of the State of Connecticut; DEMOCRATIC PARTY OF THE STATE OF CONNECTICUT; and REPUBLICAN PARTY OF THE STATE OF CONNECTICUT,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

MOTION OF APPELLEES DEMOCRATIC AND REPUBLICAN PARTIES OF THE STATE OF CONNECTICUT TO AFFIRM AND BRIEF IN SUPPORT THEREOF

JAMES A. WADE
799 Main Street
Hartford, Connecticut 06103
Attorney for Appellee Democratic Party of the State of Connecticut

CARL CELLA
One Broadway
North Haven, Connecticut 06473
Attorney for Appellee Republican Party of the State of Connecticut

THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN., N.Y.

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Appellees.

MOTION OF APPELLEES DEMOCRATIC AND REPUBLICAN PARTIES OF THE STATE OF CONNECTICUT TO AFFIRM AND BRIEF IN SUPPORT THEREOF

Appellees, the Democratic Party of the State of Connecticut and the Republican Party of the State of Connecticut, move, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, that the judgment of the United States District Court for the District of Connecticut be affirmed on the ground that the questions presented on appeal are not so substantial as to warrant further argument.

Statement

This is a direct appeal from the judgment dated July 20, 1976, of the United States District Court for the District of Connecticut, sitting as a three-judge court, dismissing the Appellants' Complaint which sought to enjoin enforcement of Section 9-431.[1] of the Connecticut General Statutes (Revision of 1958).

Section 9-431 limits participation in the primaries of a given political party in the State of Connecticut to the enrolled members of that party. Appellants sought to enjoin the Secretary of the State of Connecticut [2] from enforcing § 9-431 because they claimed that it forces them, as unaffiliated voters,[3] to choose between what they claim

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[1] *Conn. Gen. Stats.* (Rev. 1958) § 9-431 provides in pertinent part as follows:

> *Eligibility to vote at primary*: No person shall be permitted to vote at a primary of a party unless he is on the last completed enrollment list of such party in the municipality or voting district, as the case may be. . . .

[2] The Secretary of the State of Connecticut has plenary supervisory authority over the conduct of elections and primaries in Connecticut. *Conn. Gen. Stats.* (Rev. 1958) §§ 3-77, 3-87, 9-3 and 9-4. However, the mechanics of carrying out the electoral process must be performed by the various town clerks, registrars, election moderators and town committees in each of the 169 towns of Connecticut. None of these election officials were made parties to this action. The significance of the absence of these officials in this action is discussed in connection with the political question doctrine. *Infra*, pp. 11 *et seq.*

[3] Throughout their Brief, the Appellants refer to themselves as "independents", a term which carries with it a connotation of independent political philosophy. It is actually a misnomer. Under Connecticut law, a citizen by registering to vote becomes an "elector". *Conn. Gen. Stats.* (Rev. 1958) § 9-12. He may then apply for enrollment on the list of the political party of his preference. *Conn. Gen. Stats.* (Rev. 1958) § 9-56. If he does not choose to affiliate with a political party he is recorded on the roll of his town of residency as an unaffiliated elector.

is their right to vote and to associate in support of particular candidates on the one hand and their right to be free of coerced affiliation and to maintain their privacy of association on the other. The judgment of the District Court denied the Appellants' Motion for Summary Judgment and granted the Motions to Dismiss filed by these Appellees and by the Appellee, Gloria Schaffer.

Summary of Argument

Political parties are voluntary associations and as such have the power to regulate the membership thereof. Adherence to the philosophy and principals of a given political party is an enforceable condition of membership therein. So long as a political party does not impose constitutionally impermissible criteria for membership, they may otherwise regulate their members. Section 9-431 protects that right of association.

The Appellants' claim that § 9-431 forces them to associate with a political party whose philosophy or principles is specious. They are not required to adopt the political beliefs of every other member of such party but merely to undergo what amounts to an administrative recording of party affiliation. This process is necessary for the orderly conduct of the nominating processes of the various political parties and to prevent indiscriminate or premeditated efforts to alter the outcome of a given party's primary. Freedom not to associate is not a logical corollary of freedom to associate.

Party affiliation in Connecticut does not result in the imposition of a set of beliefs or conditions of behavior upon an elector so as to coerce him into decisions or actions he might not otherwise make. Appellants have

offered no proof that party affiliation will in any way violate their claimed right of privacy.

Appellants herein are seeking a judicial solution to a political question. Because they have failed to structure a mechanism to govern the conduct of party primaries should Section 9-431 be declared invalid, they would thrust the Court into the role of establishing rules and monitoring such primaries.

Appellants have failed to allege and prove a true case or controversy. They can participate in the primary process by the simple ministerial act of affiliating with a political party. If they choose not to do so, the Connecticut law provides adequate alternative access to the ballot, a process which has been followed by significant numbers of persons.

ARGUMENT

The principal claim asserted by the Appellants is that Section 9-431 "forces them to choose between exercise of their fundamental rights to vote and to associate in support of particular candidates on the one hand, and exercise of their fundamental rights to be free of coerced affiliation and to maintain their privacy of association on the other."[4] Stated more concisely, the Appellants want to participate in the process by which a political party chooses not only its candidates for public office but possibly its party leadership as well but do not want to be identified with the party or submit to whatever rules, however limited, it might impose on its members.

[4] Jurisdictional Statement, pp. 16-17.

These Appellees, the Democratic and Republic Parties of the State of Connecticut, submit that they and their respective members have rights of their own to associate together to advance their respective political philosophies and that included among those rights is the selection of candidates and leaders who are derived from and espouse the philosophies of their members. Section 9-431 of the Connecticut General Statutes helps to do just that.

A. Political Parties Are Voluntary Associations with the Power to Regulate the Membership Thereof.

The Democratic and Republican Parties of the State of Connecticut are, respectively, voluntary associations, instituted for political purposes. *Alcorn ex rel Dawson* v. *Gleason*, 10 Conn. Supp. 205, 217 (Com. Pl. 1941); *Fields* v. *Osborne*, 60 Conn. 544, 547, 21 Atl. 1070 (1891). Any state political party is a creature of its own time in that it is an association of a group of people with similar political theories at a given time and subject to a given set of rules. *Fields* v. *Osborne*, *supra*; *Socialist Labor Party* v. *Rhodes*, 290 F. Supp. 983, 988 (S.D. Ohio E.D. 1968); *United States* v. *Shirey*, 168 F. Supp. 382, 385 (M.D. Pa. 1958). As a political entity each political party[5] is entitled to lay down minimum standards for membership in and participation in the affairs of the Party, so long as those standards do not violate constitu-

[5] It should be noted that the Connecticut General Statutes do not limit participation in the electoral process to the Republican and Democratic parties. Section 9-372 provides for "major" parties whose candidates receive at least 20% of the vote for Governor at the last general election or at least 10% of the votes cast for the office being contested and "minor parties" whose candidates received less than 20% or 10% respectively. The number of such major and minor parties is limited only by the ability of their candidates to obtain votes in a contested election.

tionally protected rights of the rank and file.[6] However, other party regulations, which might otherwise infringe on the rights held dear by many citizens of this country, have been specifically upheld.

Thus, in *Ray* v. *Blair*, 343 U.S. 214 (1952), this Court held that party discipline is a legitimate exercise of power by a political party, notwithstanding a state statute in conflict with such discipline. In *Blair*, a "loyalty oath" adopted by the State Democratic Executive Committee of Alabama was under attack. The oath required candidates in Alabama's primary for presidential electors to pledge to support the nominees of the National Convention of the Democratic Party for President and Vice President. Title 17 of the Code of Alabama provided for regular optional primary elections in that state on the first Tuesday of May of even years by any political party. Title 17 § 347 permitted the State Executive Committee of any party to determine the qualifications of electors and § 348 required a candidate for presidential election to file his declaration of candidacy with the Executive Committee in the form prescribed by the governing body of the party. In addition, § 350 read as follows:

> At the bottom of the ballot and after the name of the last candidate shall be printed the following viz: "By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election."

[6] For example, barring participation in party affairs on the basis of race is constitutionally impermissible. In a series of cases referred to as the "White Primary Cases" this Court held that efforts by the Democratic Party of the State of Texas to prohibit Blacks from participating in the primary process violated their Fourteenth and Fifteenth Amendment rights. *See Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Grovey* v. *Townsend*, 295 U.S. 45 (1935), overruled in *Smith* v. *Allwright*, 321 U.S. 649 (1944); and *Terry* v. *Adams*, 345 U.S. 461 (1953).

The Alabama Democratic Executive Committee went one step further and added an additional provision that the elector had to agree to support the nominees of the National Convention of the Democratic Party for President and Vice President of the United States. It was this provision which was objected to by the plaintiff in *Blair*. He was supported by the Supreme Court of Alabama which held the oath in violation of the Twelfth Amendment[7] to the Constitution of the United States. 57 So. 2d 395. The United States Supreme Court reversed the Alabama Court saying in 343 U.S. at 225:

> Neither the language of Article II § 1 nor that of the Twelfth Amendment forbids a party to require from candidates in its primary a pledge of political conformity with the aims of the party. Unless such a requirement is implicit, certainly neither provision of the Constitution requires a state political party, affiliated with a national party through acceptance of the national call to send state delegates to the national convention, to accept persons as candidates who refuse to agree to abide by the party's requirement.

The Court goes on to analyze and reject the theory that the loyalty oath impinges on the elector's freedom to vote his conscience for President for which theory the plaintiff

[7] The Twelfth Amendment was adopted to eliminate the difficulties caused by Article II, Section 1 which permitted electors to vote for two persons for President and Vice President without designating which office he wanted each to fill. The result could wind up a tie and throw the election into the House of Representatives. This Amendment permitted electors to vote separately for presidential and vice presidential candidates.

relied on *United States* v. *Classic*, 313 U.S. 299 (1941) and *Smith* v. *Allwright*, 321 U.S. 649 (1944). Those cases dealt with power to punish for criminal conduct in a primary and an attempt to exclude from party participation on the basis of race. In upholding the validity of the loyalty oath,[8] the Court said in 343 U.S. at 227:

> The issue here, however, is quite different from the power of Congress to punish criminal conduct in a primary or to allow charges for wrongs to rights secured by the Constitution. A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominee is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party.

The analogy between *Ray* v. *Blair* and the present case is clear. In *Blair* the Court held that participation in a primary could legitimately be limited to candidates who pledged themselves to the "philosophy and leadership of that party". If limiting the free exercise of choice, thought, and speech by a candidate is a legitimate exercise of power by a state or political party why is it also not legitimate to limit participation in the primary that chooses that party's candidates to persons who, by enrolling in that party, espouse its philosophy and leadership as well?

The point of the foregoing discussion relating to party discipline is that the Courts have recognized room for legitimate and reasonable political rules within the statu-

[8] *See also Dickson* v. *Taylor*, 105 F. Supp. 251 (W.D. Tex. 1952) and *Seay* v. *Latham*, 143 Tex. 1, 182 S.W.2d 251 (1944) in which loyalty oaths were upheld as legitimate exercises of party discipline.

tory and constitutional framework which preserve the identity of the political party. While it might be argued that a loyalty oath impinges upon one's freedom of thought and speech, such an oath has been held to be a legitimate exercise of party discipline. Since a political party has the power to impose this type of sanction on its candidates, then surely it must have the power to exclude from participation in its processes to choose candidates those persons who neither embrace nor follow the philosophy and leadership of that party. While the Democratic and Republican Parties of Connecticut do not gainsay the right of the plaintiffs to remain unaffiliated, they do assert their own respective rights to establish reasonable constitutional criteria for membership in and participation in party affairs. Since the nominating process is an integral part of each party's method of choosing candidates, exclusion of those persons who do not espouse the party's philosophy and leadership is not impermissible.

B. Freedom Not to Associate is Not A Logical Corollary of Freedom To Associate.

This Court has repeatedly held that freedom of association is protected by the First Amendment to the United States Constitution. *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968); *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217 (1967); *NAACP* v. *Button*, 371 U.S. 415 (1963); *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Included among the freedoms protected is the right to "associate with others for the common advancement of political beliefs and ideas", a freedom that encompasses "the right to associate with the political party of one's choice." *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975); *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973). That right of association is a meaningless one if the party's candidates for public office and its own leadership are to be chosen

by non-party members; *i.e.*, unaffiliated electors who not only might not espouse the party's political beliefs and ideas but indeed might find them inimical to their own.

The Appellants claim that Section 9-431 leaves them with the awful choice of not voting in a party's primary or giving up their "right not to associate". But where does an alleged right not to associate come from? *Elrod* v. *Burns*, — U.S. —, 44 U.S.L.W. 5091 (June 28, 1976), relied on so heavily by Appellants, is not controlling. In *Elrod*, this Court held that patronage dismissals of non-civil service employees of the Cook County, Illinois Sheriff's Office violated First and Fourteenth Amendment rights by forcing employees to join a political party they might otherwise disavow in order to keep their jobs. At stake was public employment which was being controlled by partisan considerations.

That is not the case here. All Section 9-431 does is limit participation in a partisan event, *i.e.*, the primary nominating process, to members of that partisan group.[9] There is no impact on one's livelihood, one's freedom of speech or one's political beliefs. The statute simply insures that the selection of a party's candidate in a state election [10] will be selected by members of that party. In

[9] The Appellants herein make no claim that the prohibition against crossover voting in Connecticut's primaries fails to meet constitutional standards. By seeking to vote in the primary of their choosing simply because they are unaffiliated, the Appellants seek a greater right than that afforded members of the major parties.

[10] In the recent Presidential election, the Democratic Party for the State of Connecticut conducted its own Presidential primary which was run and financed entirely by the Democratic Party outside the State's election laws. Neither Republicans, unaffiliated electors or minor party members were able to participate in this primary. It was an internal election conducted solely by a voluntary association in accordance with its own rules.

effect, the Appellants are being told that if you want to participate in the nominating game you must play the game according to the rules of the party whose candidates you are nominating. No one is barred from participating because he belongs to a constitutionally protected class of citizens. There is no coerced association in the constitutional sense.

Appellants further allege that if they "did succumb to the statute and swear an allegiance, they did not feel, there can be little doubt that publication of a list identifying them with a particular party would invade their privacy." [11] They did not choose to offer any evidence in support of this claim. The District Court quite properly disposed of this issue by noting that it is insufficient "merely to raise the spectre of harassment; instead, they must make a detailed factual showing of actual threats or incidents of harassment." [12]

C. Appellants Seek A Judicial Solution To A Political Question.

On the face of the Appellants' Complaint they seek simply to have Section 9-431 of the Connecticut General Statutes declared unconstitutional insofar as it prohibits unaffiliated voters from voting in a party's primary and to enjoin the Secretary of State from enforcing the same. This deceptively simple prayer for relief ignores the mechanics of running a primary election wherein, suddenly, a whole new class of voters are eligible to cast ballots without any method of insuring a fair election. Apparently the Appellants sought to remedy that problem by asking the Court to require the Secretary of State to

[11] Jurisdictional Statement, p. 21.

[12] Memorandum of Decision, Appellants' App. p. A-9.

"send to the clerks of each municipality in the State instructions for the use of the moderators in each voting district in the State, which instruction shall require each moderator to ensure that each plaintiff and each member of the plaintiff class is permitted to vote in a primary election of his or her choice."

Under Connecticut law, election laws are peculiarly the province of the General Assembly. *Lacava* v. *Carfi*, 140 Conn. 517, 519, 101 A.2d 795 (1953). The exercise of suffrage is not a natural but a political right, and the legislatures of the states acting within the powers conferred by their constitutions may prescribe the manner in which elections shall be conducted and the right of suffrage exercised. *Mills* v. *Gaynor*, 136 Conn. 632, 636, 73 A.2d 823 (1950); *Talcott* v. *Philbrick*, 59 Conn. 472, 478, 20 Atl. 436 (1890). Accord, *Scully* v. *Town of Westport*, 20 Conn. Supp. 399, 401, 137 A.2d 352 (1957). "The administration of the electoral process is a matter that the Constitution largely entrusts to the states." *Kusper* v. *Pontikes*, *supra*, 414 U.S. at 57.

It is well established that the federal courts will not adjudicate political questions. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *Coleman* v. *Miller*, 307 U.S. 433 (1939); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918). In *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), this Court listed six categories of cases which historically involve questions deemed political and therefore non-judiciable:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of

> a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for an unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

These Appellees contend that this case presents exactly the type of issue that this Court said should be decided politically rather than judicially. In adopting the election laws of the State of Connecticut the General Assembly has established a policy which promotes the two party system instead of permitting the proliferation of political parties in evidence in a number of countries. Any attack on that policy should not be taken lightly.

Underpinning the election process in Connecticut is an elaborate system which is calculated to eliminate unlawful conduct and to insure that each elector's vote will be counted, but only once. By merely attacking the constitutionality of § 9-431 without spelling out the method of effecting a new system, the Appellants present to this Court classic political questions.

Should crossover of party lines be allowed? How does one insure that an unaffiliated elector votes in only one primary? At what primary stage should unaffiliated voters be allowed to participate?[13] If the unaffiliated

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[13] In Connecticut, the town committee of a major party constitutes the executive leadership of that party in a given town. Town committee members of a party can be selected by primary vote. (*Conn. Gen. Stats.* § 9-390). Similarly, delegates to the state convention of a major party who select the members of a party's state central committee may be chosen in a primary. Are the unaffiliated voters to be permitted to vote in primaries to select the party leadership they expressly disavow by refusing to affiliate?

elector can vote in primaries at every stage of the process, what happens to the accountability of the persons so elected?

These questions suggest that the problems raised by the Appellants in this action are more susceptible to solution, if indeed they are to be solved at all, legislatively rather than judicially. Since the electoral process is fundamentally a legislative one, this Court should not attempt to venture into an area that requires the ongoing oversight of the Secretary of State's Office. It is conceivable that this Court could become the enforcement agency of any order it might issue relating to primaries to be conducted in all 169 towns in both political parties. If ever a subject called for judicial restraint, this is it.

D. Appellants Have Failed To Allege a True Case Or Controversy.

In establishing the judicial branch of government, the United States Constitution limits the judicial power only to "cases" or "controversies".[14] The cases or controversies concept has been construed to embrace matters which are appropriate for judicial determination. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819 (1824). Thus the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U.S. 300, 301 (1892); *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922); *Massachusetts* v. *Mellon*, 262 U.S. 447, 487 (1923). It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character as distinguished from an opinion advising what

[14] U.S. Const. Art. III, § 2.

the law would be upon a hypothetical state of facts. *Muskrat* v. *United States*, 219 U.S. 346, 367 (1911); *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, 162 (1922); *Ashwander* v. *T.V.A.*, 297 U.S. 288, 374 (1936).

The Appellees, Democratic and Republican Parties of Connecticut, respectfully submit that the Appellants herein have failed to allege a true case or controversy for two reasons. First, if their Complaint is that they are denied access to the ballot at a critical stage of the electoral process, when the major parties are nominating their candidates, that claim is taken care of by the Connecticut General Statutes which contain alternative methods of nominating candidates. Secondly, the Appellants themselves, either by joining a party, forming a new party or switching parties are themselves capable of mooting the claim raised herein.

1. Access to the Ballot

It is interesting to note that the Appellants challenge only § 9-431 of the Connecticut General Statutes which deals with the last stage of the nominating process. The Appellants express no interest in participating in any of the preliminary stages leading up to a possible primary nor in helping to select party candidates by any of the several methods[15] provided for in the statutes. It would appear, therefore, that their claim that they are pre-

[15] In addition to the challenge primary method, § 9-390 permits party endorsement of candidates for municipal office, town committee membership and convention delegates by: (1) caucus of enrolled party members; (2) delegates to a convention chosen in accordance with party rules; and (3) the town committee of the party itself.

vented from participating in an integral part of the process is specious.

While the Appellants' Complaint claims that they are barred from participating in a part of the process by which their Senators and Representatives are chosen, it must be remembered that Title 9 of the Connecticut General Statutes, and § 9-431 in particular, apply to the selection of candidates at every level of government. In addition, it is important to note that the Connecticut system is a "challenge primary" system—not every candidate nor every elector has a "right" to participate in a primary.

The basic nominating process is contained in § 9-380 which provides that state or district conventions, as the case may be, shall "choose a candidate for nomination to each state or district office".[16] Candidates for municipal office and for town committees of the parties are governed by § 9-390. Delegates to state or district conventions are chosen pursuant to § 9-393, who in turn choose the nominee at such conventions. In the majority of cases the nominating process ends at the convention and the party's nominee is presented to the voters at the general election.

The challenge aspect of Connecticut's system derives from the convention itself. If a candidate for office desires to challenge the choice of the convention as the party's candidate the process for qualifying for a primary is spelled out in § 9-400. He must first receive at least 20% of the votes of the convention delegates present and voting on any given roll call. He must also file with the Secretary of the State a petition bearing the signatures

[16] See *Conn. Gen. Stats.* § 9-372 for definitions of state, district and municipal offices and for major and minor parties.

of electors residing within the district under contest according to a statutory formula.[17] Finally he must deposit with the Secretary of the State a sum of money equal to 5% of the salary of the office for which his candidacy is to be filed.[18] Only after all of these criteria have been met is the candidate eligible to challenge the party's nominee.

Thus it can be seen that there is no automatic right either for a candidate or an elector to participate in a primary. If an elector favors the candidacy of a particular individual for United States Senator in a given party, he will not get a chance to vote for him unless that individual: (a) qualifies to participate in a primary; and (b) takes the affirmative steps to actually trigger a primary. If the membership of a given party have no "right" to participate in a primary, either as a candidate or as an elector, it is difficult to conceive that an unaffiliated voter somehow has a superior "right" so to do.

2. Participation by Independent and Minor Parties.

While an appearance on the ballot by a candidate seeking the nomination of a major party is governed by an elaborate procedure, people who qualify as representing a minor party have virtual clear sailing on to the ballot. Sections 9-453(a) through 9-453(s) of the Connecticut General Statutes provide a mechanism for a person who has not been nominated by a major party to have his name placed before the voters via the petition route. In summary, such a candidate must obtain signatures equal

[17] State office: 5,000; Congressional office; 2,000; Sheriff; 750; multi-town district office: 350; probate judge: 100.

[18] For judge of probate the sum is $50.00 and for State Senator or State Representative the sum is $25.00.

to one percent of the votes cast for the same office at the last preceding election.[19] Once the petition has been approved by the Secretary of the State,[20] the candidate's name will appear on the ballot. Since 1966, in various offices to be elected throughout the state, 969 petitions have been approved and 147 petitions have been disapproved.[21] It certainly appears that there has not been a lack of interest or participation in the nominating process.

Once a person has appeared on the ballot he may achieve the status of either a major party [22] or a minor party [23] depending on the number of votes he receives. Once the candidate receives major party status all of the rights to support his cause flow to him and his followers. If he fails to achieve major party status but does qualify for minor party status, his path thereafter is even smother. All he need do to qualify for the ballot is to follow the rules of his minor party. See *Connecticut General Statutes* §§ 9-451 and 9-452.

Annexed hereto as Appendix A is an enumeration of the number of candidacies which have achieved either major or minor party status. Once again it appears that a significant number of poeple have been sufficiently interested in the process to take advantage of the opportunities it avails them to appear on the ballot and present themselves to the voters.

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[19] *Conn. Gen. Stats.* § 9-453(d).

[20] *Conn. Gen. Stats.* § 9-453(o).

[21] *See* Appendix A.

[22] A major party is one whose candidate for governor received over 20% of the total vote cast or whose candidate for the office contested other than governor received over 10% of the total vote cast. *Conn. Gen. Stats.* § 9-372(e).

[23] A minor party is one whose candidate for governor received less than 20% of the total vote cast or whose candidate for the office contested received more than 1% but less than 10% of the total vote cast. *Conn. Gen. Stats.* § 9-372(f).

If the Appellants claim herein that the reason they want to participate in a party primary is to have a say in who the ultimate choice of the party will be, it is claimed that any dissatisfaction with the party's choices can, and has been challenged through the process available to interested persons. Therefore, it is contended that the claim raised herein does not present a true case or controversy.

3. Participation by the Appellants

It is submitted that being an "unaffiliated voter" is merely a status. The person who is "unaffiliated" can change that status at will by enrolling with a party, major or minor, of his choosing. This Court has neither the power, nor the desire it is assumed, to require that the Appellants remain unaffiliated.

The Appellants claim that they have a right not to associate with others by refusing to join a party. Neither the Republican nor the Democratic Parties of Connecticut dispute that right. But they also claim that mere enrollment with a party does not in any way do violence to an individual's freedom of thought. Within both parties there are people with political philosophies of every imaginable stripe. All of these people are welcomed into the respective political organizations, since they enrich the philosophy of the party as a whole.

If indeed, the Appellants wish to influence the ultimate choice of a candidate by either party, they need only go through the mechanical process of affiliation.[24] This process in no way challenges his freedom of thought or

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[24] *Conn. Gen. Stats.* § 9-20.

association. All it does is make him eligible to participate in party affairs, including any primaries of that party that occur within his town, district or the State. The Appellants herein are free to avail themselves of that process and by doing so would render their claim moot.

The Appellants themselves note that the "parties make no attempt to screen potential members to ensure that they adhere to a few vague principles that may be identified in party platforms or other documents. Indeed, any registered voter in Connecticut may affiliate with either major party without a test of his loyalty or his principles." [25] If that is the case, where is the controversy herein that merits plenary consideration by this Court? It is respectfully submitted that based on the Appellants' own argument, there simply is not a problem of constitutional dimension for review by this Court.

[25] Jurisdictional Statement, p. 25.

CONCLUSION

For all of the reasons stated herein, this Court should affirm the judgment of the United States District Cour for the District of Connecticut here appealed from because the Appellants have failed to present a substantial question for the decision of this Court.

Attorney for Appellee Democratic Party of the State of Connecticut
By JAMES A. WADE
ROBINSON, ROBINSON & COLE
799 Main Street
Hartford, Connecticut 06103
Its Attorney

Attorney for Appellee Republican Party of the State of Connecticut
By CARL CELLA
One Broadway
North Haven, Connecticut 06473
Its Attorney

Dated: November 7, 1976

APPENDIX

Affidavit of Clifton A. Lenhardt, Deputy Secretary of the State

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF CONNECTICUT

Civil Action No. H 76-20

NATHRA NADER and ALBERT C. SNYDER, JR.,
Plaintiffs,

VS.

GLORIA SCHAFFER, Secretary of the State, State of Connecticut,

DEMOCRATIC PARTY OF THE STATE OF CONNECTICUT and REPUBLICAN PARTY OF THE STATE OF CONNECTICUT,
Defendants.

I, Clifton A. Leonhardt, being first duly sworn according to law, depose and say:

1. That I am the Deputy Secretary of the State for the State of Connecticut.

2. That the Elections Division of the Office of the Secretary of the State lies within my general supervisory authority.

3. That at my direction the staff of the Elections Division of the Office of the Secretary of the State has researched the number of candidacies which have achieved major party status in state elections, exclusive of Demo-

cratic and Republican party nominees, from 1966 through 1974; the number of candidacies which have achieved minor party status in state elections from 1966 through 1974; and the number of nominating petition candidates in state and municipal elections, not including primary petition candidates, from 1966 through 1975.

4. Attached hereto and made a part hereof are the results of such research which are certified to be true and correct.

Dated at Hartford, Connecticut this 10th day of May, 1976.

/s/ CLIFTON LEONHARDT
CLIFTON A. LEONHARDT
Deputy Secretary of the State

Sworn and Subscribed to
before me this 10th day
of May, 1976.

JOSEPH W. GAYDOSH
Notary Public
My Commission Expires:
4-1-77

NUMBER OF CANDIDACIES WHICH HAVE ACHIEVED *MAJOR* PARTY STATUS IN STATE ELECTIONS

(Exclusive of Democratic and Republican Party Nominees)

1966 - 1974

1966— None			
1968— None			
1970—	7	U.S. Senator:	1
		State Senator:	2
		State Representative:	2
		Judge of Probate:	2
1972—	1	State Representative	
1974—	1	State Representative	

NUMBER OF CANDIDACIES WHICH HAVE ACHIEVED *MINOR* PARTY STATUS IN STATE ELECTIONS

1966 - 1974

1966—	13	Representative in Congress:	2
		State Senator:	2
		State Representative:	9
1968—	5	Electors of President and Vice President (slate):	1
		Representative in Congress:	2
		State Senator:	1
		State Representative:	1
1970—	8	Representative in Congress:	2
		State Senator:	3
		State Representative:	3
1972—	13	Electors of President and Vice President (slate):	1
		Representative in Congress:	1

	State Senator:	1
	State Representative:	9
	Judge of Probate:	1
1974— 21	Governor/Lieutenant Governor:	1
	Secretary of the State:	1
	Treasurer:	1
	Comptroller:	1
	U.S. Senator:	1
	Representative in Congress:	6
	State Senator:	3
	State Representative:	6
	Judge of Probate:	1

NUMBER OF NOMINATING PETITION CANDIDATES IN STATE AND MUNICIPAL ELECTIONS

(Not including primary petition candidates)
1966 - 1975

	Petitions Approved [1]	*Petitions Disapproved* [2]
1966—	24	16
1967—	39	3
1968—	7	7
1969—	170	30
1970—	24	None
1971—	212	30
1972—	23	9
1973—	192	24
1974—	29	15
1975—	249	13
Total	969	147

[1] May include some candidacies subsequently withdrawn
[2] Including petitions issued but not filed

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-504

NATHRA NADER AND ALBERT C. SNYDER, JR.,
Appellants,

v.

GLORIA SCHAFFER, Secretary of the State, State of Connecticut; DEMOCRATIC PARTY OF THE STATE OF CONNECTICUT; and REPUBLICAN PARTY OF THE STATE OF CONNECTICUT,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16 OF THE REVISED RULES OF THE SUPREME COURT

CARL R. AJELLO
Attorney General

BARNEY LAPP
Assistant Attorney General

DANIEL R. SCHAEFER
Assistant Attorney General

ROBERT T. STATCHEN
Assistant Attorney General

Counsel for the Secretary of the State, State of Connecticut

30 Trinity Street
Hartford, Connecticut 06115
Telephone: Area 203 566-2203

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MOTION TO DISMISS OR AFFIRM PURSUANT TO RULE 16 OF THE REVISED RULES OF THE SUPREME COURT

The Appellee, Secretary of the State, State of Connecticut, respectfully moves, pursuant to Rule 16 of the Revised Rules of the Supreme Court, to dismiss the appeal and, in the alternative, to affirm the judgment below on the grounds that: (a) it does not present a substantial federal question and (b) it is manifest that the questions on which the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This is an appeal from the unanimous decision of a three-judge District Court. The Court upheld the constitutionality of the portion of the Connecticut election law, § 9-431, Conn. Gen. Stat., which requires only that an elector be an enrolled party member in order to vote in that party's primary.

An unaffiliated voter may enroll in a party and participate in a primary election as late as the third Saturday before it is held. Conn. Gen. Stat. § 9-56. A voter who is already enrolled in a party and seeks to affiliate with another party need only wait six months before voting in the other party's primary. Conn. Gen. Stat. § 9-59. Affiliating with a party requires simply that the applicant fill out a form at the local Registrar of Voters office, giving his or her name, address, party affiliation desired, present affiliations with any other party, any affiliations or requests for affiliations with other parties within the last six months, and the date of application for erasure from the other party's rolls, if applicable. Conn. Gen. Stat. § 9-56.

The District Court found that these requirements properly ensure that there is "a minimal demonstration by the voter that he has some 'commitment' to the party in whose primary he wishes to participate." Memorandum of Decision, p. 16. The Court ruled that the statute in question served completely legitimate state interests in the prevention of party "raiding" and the distortion of primary contests by those who have no interest whatsoever in the party or its principles.

The balance of the proceedings and remaining background are adequately set forth in the opinion of the three-judge District Court (Jurisdictional Statement, pp. A-2 - A-6) and need not be repeated here.

THE APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION AND THE QUESTIONS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

This appeal seeks to overturn one of the most elementary standards for conducting party primaries. This is the simple requirement that in order to vote in a party primary, one should be a party member. There is no question as to any unreasonable or arbitrary criteria for party affiliation, or of any suspect classification based upon wealth, race, property status or other grounds. Nor is there any issue as to restrictions on political activity or voting rights as a result of party affiliation. All that is involved is the bare claim that one who has not affiliated with a political party and has no intention of ever doing so nevertheless has an inherent, constitutional right to vote in party contests. This of course supposedly carries with it the right to influence the outcome of struggles for leadership and political position within the party. The broad assumption for this attack is that party goals and philosophies are invariably vague and meaningless (Jurisdictional Statement, p. 25); that one of the appellants in 1974 "decided that there was no significant difference between the two major parties;" that "[t]he Watergate scandals also persuaded him that the the present political system makes candidates excessively dependent on their parties and unwilling to be independent and honest;" that "he has had little real choice between candidates at the general election;" and that "the perecntage of voters who do not vote in such elections indicates that other voters share his views." (Jurisdictional Statement, p. 4).

On the basis of sentiments such as these, appellants seek to annul the statutory safeguards requiring merely that voting in party primaries be limited to enrolled party members. These statutes are supposedly prohibited by the Constitution and are absolutely beyond the legislative power of a state, so the

argument goes. This claim would in effect mandate the so-called "crossover" primary in every state in the union — with all its attendant difficulties and confusion which recent criticism has brought to light.[1] This is a demand for drastic and radical judicial surgery contrary to all established principles of justice, equity, and constitutional law. The appeal is devoid of any merit whatsoever and certainly does not justify plenary consideration by this Court. A review of the controlling decisions makes this clear.

A. POLITICAL PARTY ENROLLMENT PRIVILEGES AND *ROSARIO v. ROCKEFELLER*.

One of the leading cases on the subject of party enrollment privileges is *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). That decision dealt with the New York closed primary system. Voters desiring to affiliate with a political party had to do so thirty days prior to the November general election in order to vote in the party primaries the following year. This meant, in effect, an eight month waiting period for the June presidential primaries and an eleven month waiting period for the September non-presidential primaries. The plaintiffs claimed that because they did not register in time, they could not vote in the 1972 Democratic primaries. However, the Court noted that:

> "Although they could have registered and enrolled in a political party before the cutoff date in 1971 — October 2 — they failed to do so. . . ."
>
> 410 U.S. at 756.

Equal protection, right to vote and freedom of association allegations similar to those involved here were made in

[1] See Memorandum of Decision, Jurisdictional Statement, p. A-22, and note 8 to the Memorandum of Decision, *id.*, p. A-26, citing a number of editorials, news commentaries, and law reviews on this point.

that case. These claims were based upon decisions which had struck down statutes denying the right to vote to non-property owners, servicemen, or newly arrived residents. It is noted that similar cases have been cited by the plaintiffs in the present action. The Court, however, stated that:

> "In each of those cases, the State totally denied the electoral franchise to a particular class of residents and there was no way in which the members of that class could have made themselves eligible to vote. . . ." *Id.* at 758.
>
> "Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong — newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary. . . ."
>
> "The petitioners do not say why they did not enroll prior to the cutoff date; however, it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.
>
> "For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in

order to participate in their chosen party's next primary. . . ."

Id. at 758-759.

The Court noted that the New York provisions did not lock in a voter to a particular party affiliation from one primary to the next. An elector could transfer so as to vote in the primaries the following year provided an application was made in time.

Looking to the purpose of the deadline provisions, the Court noted that the time period involved was:

"not an arbitrary time limit unconnected to any important state goal. The purpose of New York's delayed-enrollment scheme, we are told, is to inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."

Id. at 761.

The Court quoted the ruling of the Second Circuit Court of Appeals below, recognizing that " '[T]he notion of raiding, its potential disruptive impact, and its advantages to one side' " was a proper subject of state legislation. *Id.* at 762.

The Court also stated that:

"It is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal. Cf. Dunn v. Blumstein, supra, 405 U.S. at 345, 92 S.Ct. at 1004; Bullock v. Carter, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed. 2d 92 (1972) . . . ."

Id. at 762.

The Court concluded that the New York provisions involved "merely imposed a legitimate time limitation on their enrollment, which they chose to disregard." *Id.* at 763.

It is noted, furthermore, that even the dissent in that case acknowledged:

"Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. . . ."

Id. at 766.

The considerations involved in *Rosario* are of obvious importance here. In both cases we are dealing with previously unaffiliated voters. Under the Connecticut procedure, furthermore, there is a waiting period of less than twenty-one days in contrast to the eight and eleven month periods involved in *Rosario*. The plaintiffs in the present case can vote in a primary at any time provided they make the necessary application by the third Saturday before the primary. The State is not preventing them from submitting this application. Their failure to apply and to exercise the resulting enrollment privileges is an act of their own volition.

As to the minimal waiting period involved, the State has an interest in maintaining the integrity of the political process. This involves not only the prevention of intentional raiding, but also the distortion of the results of a party primary due to participation by those who are not party members.

It is also clear that we are not dealing with a waiting period that is unnecessarily restrictive as in *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). In that case the Court struck down a provision of the Illinois election code which prohibited a

person from voting in a political primary if he had voted in the primary of any other party within the preceding twenty-three months. The Court stated:

> "The effect of the Illinois statute is thus to 'lock' the voter into his pre-existing party affiliation for a substantial period of time followig participation in any primary election, and each succeeding primary vote extends this period of confinement. . . ."
>
> *Id.* at 58.

As to the raiding problem and *Rosario*, the Court stated:

> "It is also true that the Court recognized in Rosario that a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may affect the integrity of the electoral process. . . ."
>
> *Id.* at 60-61.
>
> "The New York statue at issue in Rosario did not prevent voters from participating in the party primary of their choice; it merely imposed a time limit on enrollment. Under the New York law, a person who wanted to vote in a different party primary every year was not precluded from doing so; he had only to meet the requirement of declaring his party allegiance 30 days before the preceding general election. . . ."
>
> *Id.* at 61.

As a result, even if an elector did submit a timely application he could be locked in from year to year, unlike the situation in New York and Connetcicut.[2]

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[2] It is also noted that a statute prohibiting an elector who votes for one office in a party primary from voting in another party primary for a different office was upheld in *Green* v. *Texas*, 351 F.Supp. 143 (N.D. Texas, 1972). *See also Dickson* v. *Taylor*, 105 F.Supp. 251 W.D. Texas, 1952), appeal dismissed, 202 F.2d 4261 (5th Cir. 1953).

Other cases which have held primary restrictions invalid can be distinguished. See, e.g., *Nagler* v. *Stiles*, 343 F.Supp. 415 (D. N.J. 1972) (two year waiting period for party transfer); *Yale* v. *Curvin*, 345 F.Supp. 447 (D. R.I. 1972) (26 month waiting period); *Gordon* v. *Executive Committe of Democratic Party of Charleston*, 335 F.Supp. 166 (D. S.C., 1971) (one year waiting period, pre *Rosario*.)

The *Rosario* rationale was followed in *Storer* v. *Brown*, 415 U.S. 724 (1974). That case involved a California statutory requirement that an independent candidate not have been affiliated with a political party for at least a year before the election at stake. The Court upheld the provision, first distinguishing the situation from cases involving an outright denial of the vote:

> "It has never been suggested that the Williams-Kramer-Dunn rule automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters who will elect members of Congress. Art. I, § 2, cl. 1. Also Art. I, § 4, cl. 1, authorizes the States to prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.' Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. . . .
>
> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; . . ."
>
> 415 U.S. at 731.

The Court relied heavily on the *Rosario* decision and the legitimate purpose of preventing interparty raiding. In comparing *Rosario* to *Kusper*, the Court also stated:

"The Court did not retreat from Rosario or question the recognition in that case of the States' strong interest in maintaining the integrity of the political process by preventing interparty raiding. . . ."

Id. at 732.

In upholding the California restriction, the Court recognized,

" 'the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.' "

Id. at 733.

A similar ruling was issued by the Court at the same time *Storer* was decided in *American Party of Texas* v. *White*, 415 U.S. 767 (1974). There the Court was dealing with a Texas provision which prohibited persons who had voted in recent party primaries from signing nominating petitions for new independent parties. The Court noted that the state "may insist that intraparty competition be settled before the general election by primary election or by party convention." 415 U.S. at 782. As to the equal protection claims, the Court stated:

" 'Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution.' Ferguson v. Skrupa, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (1963). . . ."

Id.

In upholding the validity of the restriction involved, the Court again relied upon *Rosario* stating:

"We have previously held that to protect the integrity of party primary elections, States may establish waiting

periods before voters themselves may be permitted to change their registration and participate in another party's primary. Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed 2d 1 (1973) Cf. Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed. 2d 260 (1973). Likewise, it seems to us that the State may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process. . . ."

Id. at 786-787.

B. GENERAL STATE REGULATION AND LEGAL TREATMENT OF POLITICAL PARTIES.

In the present case we have thus far discussed the legitimate State interest in protecting the integrity of the election process. There is another consideration that is also involved, namely, the viability of the political party system. It is through this system that the policies of government are first formulated and advanced. There is a public interest in ensuring that political parties do not simply degenerate into empty labels. What we are saying is that there are associational rights of the parties themselves as well as their members which are at stake in this matter. The State has an interest in providing a certain degree of reasonable protection for those rights consistent with constitutional requirements.

The associational rights of the political parties were highlighted in *Ripon Society* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975). In that case the Court upheld a "victory bonus" delegate formula for the Republican National Convention against a one person, one vote challenge. The Court stated:

"What is important for our purposes is that a party's choice, as among various ways of governing itself, of the

one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution as much if not more than its condemnation. The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association. Speeches and assemblies are after all not ends in themselves but means to effect change through the political process. If that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.

"The Supreme Court has frequently stressed the close kinship of the freedoms of speech and of political association. See, e.g., *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57, 94 S.Ct. 303, 38 L.Ed. 2d 260 (1973); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958). It has declared that '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed. 2d 1311 (1957). It has invoked the First Amendment to strike down state restrictions on access to the general election ballot, stating that '[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.' Williams v. Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 11, 21 L.Ed. 2d 24 (1968)."

Id. at pp. 585-586.

The "constitutionally protected rights of association" were also recently recognized by the U.S. Supreme Court in *Cousins* v. *Wigoda*, 419 U.S. 477 at 489 (1975).

The political party associational rights are certainly proper subjects of state regulation. In *Ray* v. *Blair*, 343 U.S. 214 (1952) the Court upheld a loyalty oath requirement for candidates for Presidential electors. The Court recognized the role of political parties in modern government, stating:

> "As is well known political parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable. Compare Bryce, Modern Democracies, p. 546. . . ."

Id. at 220-221.

The Court noted that a political party had been defined as follows:

> "'A political party is a voluntary association, instituted for political purposes. It is organized for the purpose *of effectuating the will of those who constitute its members*, and it has the inherent power of determining its own policies.'"
> (Emphasis added.)

Id. at 222 n. 9.

The loyalty oath requirement, the Court stated, "protects a party from intrusion by those with adverse political principles." *Id.* at 221-222. The Court also noted that while racial requirements had been held invalid, "a state might reasonably classify voters or candidates according to party affiliations."

Id. at 226, n. 14.

The concept that the constituency of a political party is its members was also recognized in *State of Georgia* v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971), cert. den.

404 U.S. 858. That case involved a challenge to the delegate composition for the Democratic National Convention. It was contended that delegates should be allocated on the basis of the entire population of a state and not party membership and strength within the state. The Court rejected this claim and upheld the delegate provisions stating:

> "The constituency of each party is significantly smaller than the whole of the eligible electorate, and varies dramatically from state to state and from election to election. For this reason it has never heretofore been thought that (with rare exceptions in one-party states) any delegate to a National Convention could fairly claim to speak for all the voters from his jurisdiction. Quite to the contrary, his constituency, if he may be said to represent a constituency, is composed only of the voters within his state who are of like political persuasion. . . ."
>
> 447 F.2d at 1279.

It is noted that the right of political association discussed in the above cases was the specific basis of upholding the Texas closed primary system in *Green* v. *State of Texas*, 351 F.Supp. 143 (N.D. Texas 1972).

> "Far from abridging federal rights, the Texas statutes here under review serve to protect the political rights of Texans to join political parties and to enjoy the free right of association appurtenant thereto with some protection against raids and interference from independents or members of other political parties."
>
> 351 F.Supp. at 145.

Finally, it is noted that the provisions of the Connecticut primary law were upheld in *Tansley* v. *Grasso*, 315 F.Supp. 513 (three-judge Court, D. Conn. 1970). The Court sustained

the requirement that certain candidates obtain 20% of the convention vote before being entitled to conduct a primary. In recognizing the broad discretion afforded states in formulating election policies, the Court noted:

> "The state does have an interest in maintaining the integrity and stability of existing political parties, thus encouraging responsible action on their part. . . ."
> 315 F.Supp. at 517.

The appellants' reliance upon *Elrod* v. *Burns*, —— U.S. ——, 44 L.W. 5091 (June 28, 1976) is entirely misplaced. The patronage system in that case required public employees to act contrary to their political beliefs in order to keep their jobs.

> "An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. . . ."
>
> *Id.* at 5094.

In the present case, there is no coercion whatsover. An elector affiliates with a party based upon free choice. The limitation of voting in party primaries to party membership is completely justifiable in order to prevent deception and distortion, unlike the patronage system in *Elrod*. Furthermore, it is noted that the District Court, contrary to the appellants' claims, did not ignore the *Elrod* case, but expressly referred to it in the Memorandum of Decision. See Jurisdictional Statement, pp. A-9 — A-10.

If anything, this case recalls the language in *Buckley* v. *Valeo*, —— U.S. ——, 96 S.Ct. 612 (1976), where the Court recognized the important public interest in preventing " 'splintered parties and unrestrained factionalism.' " 96 S.Ct. at 671. The state has a legitimate concern in this regard to ensure the integrity and viability of the party system by the statutes in question.

C. SPECIAL CONSIDERATIONS OF PARTY RESPONSIBILITY AND LEGISLATIVE HISTORY.

The legitimate interests of party responsibility involved in the closed primary have been recognized in legal and political science commentaries. See, e.g., Comment, *The Right to Vote and Restrictions on Crossover Primaries*, 40 U.Chi. L.R. 636 at 659-60 (1973):

> ". . . The right of political association should require these decisions to be made by each party. The government is prohibited from impairing the organization of a group seeking to nominate a candidate. Requiring a group to open its doors to all comers dilutes the effectiveness of the group and serves the same result as prohibiting their organization in the first place. . . .
>
> "It is a perfectly tenable constitutional position to permit the states or the political parties themselves to protect party integrity by placing time restrictions on crossovers, provided the restrictions are neutral in nature and application, and, at the same time, to prohibit any other restriction on primary participation, finding no sufficient state interest to justify it."

See also Note, *Primary Elections: The Real Party In Interest*, 27 Rutgers L.R. 298 at 306, 311 (1974):

> "Since a major aspect of the primary is furtherance of associational interest, the outcome of such a partisan process should express the consensus of the party's members. Although each major party must represent a wide spectrum of political views to garner the support necessary to win elections, the party, like any other association, cannot function effectively unless there is general agreement among its constituents as to goals. . . .
>
> "Candidates nominated in partisan primaries run in the general election as the representative choice of the party. Voters may rely heavily on the party endorsement, on the assumption that the candidacy is valid and that the party is so structured as to represent fairly all its members. Where there is no adequate check on the bona fides of those exercising decision-making power within the party, this assumption may no longer be valid. Thus voters are likely to be misled by false party labels where raiding actually occurs."

See also 17 Wayne L.R. 1543 at 1564-1565 (1971); 39 Nebraska L.R. 473 at 488-490 (1960); and Note, *Judicial Control Of Actions Of Private Associations*, 76 Harv. L.R. 983 at 1008 (1963).

The history of the direct primary and the considerations involved from the political science standpoint are also discussed in V. O. Key, Jr., *Politics, Parties & Pressure Groups*, Crowell Co., (5th Ed. 1964). The author discusses the evolution of political nominating practices and the abuses involving primary "raiding" such as had occurred in Washington and Idaho. He also discusses issues of party responsibility, concluding:

"While the consensus appears to be that party would be better able to perform its role in the advancement of candidates if the open primary were abandoned, it must be conceded that systematic knowledge of the practical consequences of the open primary is limited. Yet it seems fairly clear that the open primary at times makes difficult the maintenance of orientations differentiating the two parties and probably handicaps the lesser party in those jurisdictions in which one party holds a substantial advantage. The voters of the lesser party may find it more attractive to exercise a balance of power in the primary of the major party than to engage in the troublesome task of building up their own party."

Id. at 392.

It is also noted that a report issued by the committee on political parties of the American Political Science Association, cited in *Politics, Parties & Pressure Groups, supra,* similarly states:

> "The question of open versus closed primaries needs to be reconsidered from the angle of strengthening rather than weakening party cohesion and responsibility.
>
> "*The closed primary deserves preference because it is more readily compatible with the development of a responsible party system.* However imperfectly the idea may have worked out in some instances, it tends to support the concept of the party as an association of like-minded people. On the other hand, *the open primary tends to destroy the concept of membership as the basis of party organization.*"
>
> *Toward A More Responsible Two-Party System,* published as a supplement to the *American Political Science Review,* Sept. 1950, at 71.
>
> (Emphasis contained in the article quoted.)

It is also of interest that the Connecticut primary system which has been termed a challenge primary was intended to provide the rank and file membership with greater participation than before while still preserving a responsible party system. See Dunae Lockard, "Connecticut Tries Its New Primary", 45 *National Municipal Review,* 494 (1956); Duane Lockard, *Connecticut's Challenge Primary: A Study in Legislative Politics* (Holt, 1959 at 3). It is noted that Professor Lockard served as Chairman of the State Senate Elections Committee in 1955 at the time the Bill was written. The 20% requirement and the use of the primary as a challenge method indicated that considerations of party stability as well as membership rights were taken into account.

It is also significant that the Connecticut system is known as a challenge primary. It affords party members an opportunity to contest the candidate who have already been endorsed. Challengers must first obtain 20% of the convention vote or a designated number of petition signatures by party members, depending upon the type of nomination, in order to qualify for a primary. It would certainly be incongruous to engraft judicially upon this challenge system a "primary" whereby those outside the party with no commitment to it at all could nevertheless determine the outcome.

The point, of course, is not that any one primary system is to be preferred over all others. Instead, the considerations involved clearly demonstrate that the primary law provisions involved in this case are fully supported by legitimate State interests.

D. JUSTICIABILITY AND OTHER ISSUES.

There is a serious question as to whether the present controversy is justiciable due to "a lack of judicially discoverable and manageable standards resolving it" as well as other

grounds. See *Baker* v. *Carr*, 369 U.S. 186 at 217 (1962). There are a number of other primary systems in addition to Connecticut's that exist:

1. The so-called crossover primary whereby a voter may vote in any political primary regardless of his past affiliation.

2. The blanket primary whereby a voter can participate in the primaries of both parties but for different offices. For example, he may vote for a Democratic candidate for Governor and a Republican one for United States Senator.

3. The so-called multiple vote primary whereby an elector can vote for a nominee from each party and for each office.

> See 40 U. of Chi. L.R. 636 at 649-50, *supra*, and *Politics, Parties & Pressure Groups, supra*, at 389-390.

Which system is this Court supposed to mandate?

The United States Supreme Court has recently stressed the importance of exercising judicial restraint when the freedom of adherence to a political party is involved. See *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), *supra*. Furthermore, in *O'Brien* v. *Brown*, 409 U.S. 1, 4 (1972) the Court rejected a challenge to the 1972 Democratic National Convention, stating:

> ". . . no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. Cf. *Luther* v. *Borden*, 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. . . ."
>
> *Id.* at 4.

It is also noted that the *O'Brien* Court distinguished its situation from that involving racial discrimination which triggers high standards of judicial scrutiny. 409 U.S. at 4, N. 1. See also *Armstrong, et al* v. *Schaffer, et al*, Civ. No. H 76-136, "Ruling On Motion For Preliminary Injunction" filed May 3, 1976; Comment, *Judicial Intervention In Political Party Disputes: The Political Thicket Reconsidered*, 22 U.C.L.A. L.R. 622 (1975).

In *Gaffney* v. *Cummings*, 412 U.S. 735, at 749-751, 754 (1973), the Court upheld the Connecticut reapportionment plan. It noted that it was dealing with "fundamental 'choices about the nature of representation'" which were primarily a political and legislative process. The Court admonished that the judiciary should not become ensnared in another "political thicket". *Id.* at 750. The Court noted that politics and political considerations were inseparable in reapportionment.

These considerations are especially germane here because we are dealing not with a general election as in *Cummings*, but with the internal decision making process of a political party.

E. DECISION OF THE THREE-JUDGE COURT.

In light of the above considerations, the District Court's unanimous decision was more than well founded. It would be appropriate to focus on the highlights of the opinion.

> "In addition to protecting the associational rights of party members, a state has a more general, but equally legiti-

mate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 RUTGERS L. REV. 298 (1974), and Comment, 40 U. CHI. L. REV. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Storer* v. *Brown*, 415 U.S. 724 (1974); and *American Party of Texas* v. *White*, 415 U.S. 767 (1974). . . .

• • •

"As we have noted, the phrase "preservation of the integrity of the electoral process" contemplates, in the nominating context, the assurance that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies, and goals of the party. The phrase contemplates the prevention of fraud in the nominating process, and a candidacy determined by the votes of non-party members is arguably a fraudulent candidacy. See *Rosario* v. *Rockefeller*, 458 F.2d 649, 652 (2d Cir. 1972), *aff'd*, 410 U.S. 752 (1973).

"It is clear from these cases that, in order to protect party members from "intrusion by those with adverse political principles," and to preserve the integrity of the electoral

process, a state legitimately may condition one's participation in a party's *nominating* process on some showing of loyalty to that party, and that is precisely what Connecticut does in § 9-431. The enrollment process of § 9-56 is not particularly burdensome, and it is a minimal demonstration by the voter that he has some "commitment" to the party in whose primary he wishes to participate. It does not constitute anything in the nature of an absolute barrier to voting in a primary election because it is beyond the capabilities or powers of an elector to perform as was the case in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement), and *Smith* v. *Allwright*, 321 U.S. 649 (1944) (blacks barred from participation in primary elections). Compare *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). And if plaintiffs choose not to associate, by not enrolling in a party, their right to vote in the *general* election is unaffected. Cf. *Ripon Society* v. *National Republican Party*, *supra*, at 586, 588-89."

Jurisdictional Statement pp. A-12, A-15 — A-16.

CONCLUSION

As Mr. Justice Holmes stated in his now vindicated dissent in *Lochner* v. *People of the State of New York*, 198 U.S. 45 (1905):

> "[A constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

198 U.S. at 76.

The appeal wholly disregards these principles. It seeks to cut out from the political process one of the most basic protections for making the party system work as it should. Furthermore it attempts to do so by a strong arm attack via court orders, rather than an appeal to the legislative branch of government. Merely to state the issues thus raised is to answer them. It is respectfully submitted that the appeal be dismissed, or, in the alternative, that the judgment be affirmed, pursuant to Rule 16 of the Revised Rules of the Supreme Court.

Respectfully submitted,

CARL R. AJELLO
Attorney General

By: BARNEY LAPP
Assistant Attorney General

DANIEL R. SCHAEFER
Assistant Attorney General

ROBERT T. STATCHEN
Assistant Attorney General

Attorneys for Appellee,
GLORIA SCHAFFER,
Secretary of the State,
State of Connecticut

30 Trinity Street
Hartford, Connecticut 06115

Telephone: Area 203 566-2203

CERTIFICATE OF SERVICE

I, Barney Lapp, Attorney for the Appellee Gloria Schaffer, Secretary of the State, State of Connecticut, certify that on the 12th day of November, 1976, I served a copy of the foregoing Motion by mailing, United States Mail, Postage Prepaid, to the following attorneys of record:

William Clendenen, Esq.
152 Temple Street
New Haven, Connecticut 06510

Linda D. Donaldson
Alan B. Morrison
Attorneys at Law
Suite 700, 2000 P. Street, N.W.
Washington, D.C. 20036

Gilbert Lebovitz, Esq.
37 Lewis Street
Hartford, Connecticut 06103

James A. Wade, Esq.
799 Main Street
Hartford, Connecticut 06103

Carl Cella, Esq.
1 Broadway
North Haven, Connecticut 06473

BARNEY LAPP
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

Telephone: Area 203 566-2203